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WOODFALL'S

LAW OF

LANDLORD AND TENANT.

The Thirteenth Edition.

BY

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BY

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[*528] *CHAPTER XIII.

RECOVERY OF RENT BY ACTION.

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We have now fully considered the landlord's peculiar remedy to recover rent by distress; but rent, like other debts, can be recovered by ordinary process of law, if the landlord prefer that to a distress. Formerly the process was distinguished according as it was based upon covenant or simple contract, express or implied, but these distinctions, weakened by the Common Law Procedure Acts, have (as technicalities) ceased to exist since the Judicature Acts have come into operation. It will, however, be convenient to maintain the distinctions (as regards terminology), as the terms may still be popularly used, and also because they are necessary to some extent when considering who are the persons who can sue and be sued, and how the right of action is affected by the Statute of Limitations. Rent, then, may be recovered by proceedings based on —

(1) Some express covenant in the instrument of demise, if under seal;
(2) Some express agreement contained in an instrument not under seal, or made by parol only;
(3) An agreement which the law will imply from the conduct of the parties.

SECT. 1. — *Recovery of Rent on the Covenant to pay it.*

Early law. — Previous to the year 1845, no one could sue on a covenant unless he was a party thereto, or, at furthest,

a legal representative or assign of a party (*a*); but by 8 & 9 Vict. c. 106, s. 5, it was enacted, that "under an indenture executed after the 1st day of October, 1845, an immediate estate or interest in any tenements or hereditaments, *and the benefit of a condition or covenant respecting any tenements or * hereditaments*, may be taken, although [*529] the taker thereof be not named a party to the same indenture" (*b*). The law, however, remains the same as before with regard to a deed poll (*c*).

Early law. — And even before the act an action might have been (and still may be) maintained by a party to an indenture against one who was not a party, but executed the deed (*d*); and where B. assigned the lease of a house to A. by deed subject to certain covenants, and A. took possession, it was doubted whether B.'s remedy for a breach of the covenants was not by an action of covenant, although A. never executed the deed (*e*).

On covenants in a void or voidable deed. — Where a deed is *void*, any covenant therein contained is void also, and no action can be maintained for its infraction (*f*); but if the deed be merely *voidable*, an action may be maintained for any breaches of covenant which happened before the deed was avoided (*g*). And we have already seen that the rule for construing leases is, that a proviso that the lease shall be void on breach of the covenants means that the lease shall be void at the election of the lessor (*h*).

We have also seen that if the right to take legal proceedings on a covenant depends on the performance of a condition precedent, such condition must be shown to have been performed (*i*).

(*a*) Green *v.* Horne, 1 Salk. 197; Berkeley *v.* Hardy, 5 B. & C. 355; Ld. Southampton *v.* Brown, 6 B. & C. 718; Bushell *v.* Beavan, 1 Bing. N. C. 103, 120.

(*b*) Reeves *v.* Watts, 7 B. & S. 523; L. R., 1 Q. B. 412; 35 L. J., Q. B. 171.

(*c*) Green *v.* Horne, *supra*.

(*d*) Salter *v.* Kidgley, Carth. 76; Holt, R. 211; Shower, 58; 2 Prest. Conv. 396.

(*e*) Hawkins *v.* Sherman, 3 C. & P. 459; but see Burnett *v.* Lynch, 5 B. & C. 589, 602; 1 Chit. Pl. 129, 133 (7th ed.).

(*f*) Smith *v.* White, L. R., 1 Eq. 626; 35 L. J., Ch. 454.

(*g*) Hartshorne *v.* Watson, 4 Bing. N.C. 178; Selby *v.* Browne, 7 Q. B. 620; Load *v.* Green, 15 M. & W. 216, 223.

(*h*) See *ante*, Chap. V., Sect. 18.

(*i*) *Ante*, Chap. VI., Sect. 7.

By or against whom action may be maintained. — An action for breach of covenant may be maintained by or against the parties to the contract[1] or their personal representatives, whether the covenant be one which runs with the land or be merely a personal covenant.[2] With regard to the position of

[1] **Common law remedies for rent against lessee.** — (*a*) *Under a sealed lease*, either before (Nellis *v.* Lathrop, 22 Wend. (N. Y.) 121; Shuttleworth *v.* Shaw, 6 Q. B. (Up. Can.) 517; Wilkes *v.* Steele, 14 Id. 570; Crooks *v.* Dickson, 15 C. P. (Up. Can.) 23; Coleman *v.* Reddick, 25 Id. 579; Mickie *v.* Lawrence, 5 Rand. (Va.) 571; Gillespie *v.* Thomas, 15 Wend. (N. Y.) 464), or after (Hunt *v.* Gardner, 39 N. J. L. 530, 532; Port *v.* Jackson, 17 Johns. (N. Y.) 239; Stinson *v.* Magill, 8 Q. B. (Up. Can.) 271; Montgomery *v.* Spence, 23 Id. 39), assigning the term lessee, is liable in *covenant*.

He is liable in *debt*, before assigning the term (Dennison *v.* Lee, 6 G. & J. (Md.) 383; Stockton *v.* Guthrie, 5 Harr. (Del.) 123; Bigelow *v.* Collamore, 5 Cush. (Mass.) 226; Kendall *v.* Carland, Id. 74; Hallett *v.* Wylie, 3 Johns. (N. Y.) 44); but not afterward (*per* Draper, C. J., in Montgomery *v.* Spence, *supra*, and Parker, C. J., in Fletcher *v.* M'Farlane, 12 Mass. 43).

Under sealed lease, lessor must declare specially. He cannot recover under a general count (West *v.* Cartledge, 5 Hill (N. Y.) 488). Assumpsit will not lie (Codman *v.* Jenkins, 14 Mass. 93). The only remedies are debt and covenant (*per* Wilde, J., *supra*).

(*b*) *If lease is not under seal assumpsit will lie.* — Hill *v.* Woodman, 14 Me. 38 (written lease); Thomas *v.* Sanford Steamship Co., 71 Id. 548; and Wilson *v.* Prescott, 62 Id. 115 (oral leases); Watertown *v.* White, 13 Mass. 477 (or *debt*, if the facts admit); Jaques *v.* Gould, 4 Cush. (Mass.) 384 (an unsealed, written lease); Eaton *v.* Dugan, 21 Pick. (Mass.) 538 (a general indebitatus count on an oral lease).

(*c*) *Lessee has remedy over against assignee*, if compelled to pay the rent, or answer for breaches of any other covenants (running with the land). Fletcher *v.* M'Farlane, 12 Mass. 43, 45 (assumpsit); Ashford *v.* Hack, 6 Q. B. (Up. Can.) 541. He has no remedy over, however, unless he first pay the rent (Farrington *v.* Kimball, 126 Mass. 313) or damage.

(*d*) *Assignment of reversion.* — Lessor's right to sue in covenant passes to his assignee (Van Ransselaer *v.* Bradley, 3 Denio (N. Y.) 135), and the latter can sue in his own name, the transfer not being an assignment of a chose in action.

(*e*) *Partial assignment of reversion* (Worthington *v.* Cooke, 56 Md. 51), or *ground rent* (McQuigg *v.* Morton, 39 Pa. St. 31), or *partial eviction* of tenant by third party (Lansing *v.* Van Alstyne, 2 Wend. (N. Y.) 561), have been sometimes held no bar to an action of covenant.

[2] **Remedies for rent under the reformed procedure.** — The remedy under a lease, sealed or unsealed, is a civil action in New York, Ohio, Missouri, Indiana, Kentucky, Wisconsin, Iowa, Minnesota, Arkansas, Kansas, Nebraska, California, Oregon, Nevada, North Carolina, South Carolina, Connecticut and Colorado (Bliss on Code Pleading, secs. 4, 5); and the distinctions between assumpsit, debt and covenant, have not been preserved. They are all based on contract, and it does not matter whether the contract is verbal or in writing, sealed or unsealed. Same, sec. 8 (De Loge's Adm'r. *v.* Hall, 31 Mo. 473).

In Massachusetts, under the Practice Act (Ch. 167, Pub. Sts.), the action

assignees,[3] we have already seen to what extent they have privity of contract or estate such as will enable them to sue (*k*). And it is only necessary to note this, that when there is a right of action against both the lessee and his assignee, he can proceed to execution only against one (*l*).

Proper parties in case of joint covenants. — When there are two or more persons binding or bound by the covenant it must not be forgotten that where the words of a covenant are clearly joint, and not several, it will be so construed, although the interest may be several; and so vice versâ (*m*); but where the words admit of two constructions, they will be construed to be joint or several, according to the interest (*n*); and joinder or non-joinder of parties to any proceeding must be regulated accordingly. Thus tenants in common * and their representatives ought to [*530] join in an action for a covenant to pay rent (*o*), and to be so sued (*o*). Where the interest of the covenantees is joint, although the covenant is in terms joint and several,

(*k*) *Ante*, Chap. VI. See ss. 1—3.

(*l*) Cro. Jac. 423; 1 Chit. Arch. 544 (11th ed.).

(*m*) *Ante*, 160; 1 Lush Prac. 22 (3rd ed.); Ros. Ev. 680 (13th ed.); and see Levy *v.* Sale, 37 L. T. 709.

(*n*) *Ante*, 160; Bac. Abr. tit. *Covenant* (D); 1 Lush Prac. 29 (3rd ed.).

(*o*) Thompson *v.* Hakewill, 19 C. B., N. S. 713; 35 L. J., C. P. 18.

under a sealed lease is contract in nature of covenant (Wall *v.* Hinds, 4 Gray, 256; and Greenleaf *v.* Allen, 127 Mass. 248, suits maintained against lessees after they had assigned), or debt, and upon an unsealed lease contract in nature of assumpsit or of debt.

[3] **Common law remedies for rent against assignee.** — (*a*) *Under sealed lease* he is liable in *debt* (Howland *v.* Coffin, 9 Pick. 52; Norton *v.* Vultee, 1 Hall (N. Y.) 384), or (by force of St. 32, H. 8, ch. 34), in *covenant* (Shaw, C. J., in Patten *v.* Deshon, 1 Gray, 325, 326; Pollard *v.* Shaeffer, 1 Dall. (Pa.) 210; McQuigg *v.* Morton, 39 Pa. St. 31; Ex'rs. of Dubois *v.* Van Orden, 6 Johns. (N. Y.) 105; Cameron *v.* Todd, 22 Q. B. (Up. Can.) 390; and Todd *v.* Cameron, 2 E. & A. 434; Jones *v.* Todd, 22 Q. B. (Up. Can.) 37; Selby *v.* Robinson, 15 C. P. (Up. Can.) 370; University of Vt. *v.* Joslyn, 21 Vt. 52; Armstrong *v.* Wheeler, 9 Cow. (N. Y.) 88), and covenant will lie against an assignee of part of the premises (Van Rensselaer's Ex'rs. *v.* Gallup, 5 Denio (N. Y.) 454). An assignee in possession, though he have not executed, is liable on the covenant for rent (Hurst *v.* Rodney, 1 Wash. C. Ct. 375), since it runs with the land, and, if he execute, he will be liable, though he do not take possession (Weidner *v.* Foster, 2 Penn. 23).

An assignee is liable in assumpsit upon an unsealed lease, and in some cases in debt.

the action follows the nature of the contract, and must be brought in the names of all the covenantees (*p*). For example, in a lease of a colliery the two lessees covenanted "jointly and severally in manner following," viz., that, &c.; then followed several covenants, after which was a covenant that monies due should be accounted for and paid by the lessees, their executors, &c. (not saying and each of them): this and the former covenants were held to be several as well as joint (*q*). But the legal niceties to be found in the decisions are now of little importance, as by the Rules of the Supreme Court, Order XVI., Rule 13, ample means are provided for amendments in regard to parties.

And the same remark will apply to their representatives in case of decease, unless, of course, the covenant be specially made as a several covenant also (*r*).

Proper parties in case of death. — As to the persons who may sue or be sued if the landlord or tenant die, the matter has been sufficiently discussed already (*s*); and it may suffice to notice that when the landlord has died, if the rent was due before his death, his legal personal representative, and not his heir or devisee, has a right to sue on a covenant to pay rent, although such personal representative is not named in the covenant (*t*); but if the rent became due after the landlord's death the action must be brought by his heir or devisee (*u*), that is, if the landlord was seised in fee; for if he had only a chattel interest, of course in all cases the rent must be recovered by his personal representative. And it must also be remembered that where the breach is after the death of landlord or tenant, the executor or administrator may be sued either as representative or assignee upon any covenant which runs with the land (*x*).

(*p*) Pugh *v.* Stringfield, 3 C. B., N. S. 2; 27 L. J., C. P. 34.

(*q*) Duke of Northumberland *v.* Errington, 5 T. R. 524; Copland *v.* Laporte, 3 A. & E. 517; 1 Selw. N. P. 402 (13th ed.).

(*r*) Thompson *v.* Hakewill, 19 C. B., N. S. 713; 35 L. J., C. P. 18; Foley *v.* Addenbrooke, 4 Q. B. 107; Bullen, 49.

(*s*) *Ante*, Chap. VII., Sect. 10.

(*t*) Esp. N. P. 295; Lucy *v.* Levington, Ventr. 175; 2 Lev. 26; Dollen *v.* Batt, 4 C. B., N. S. 760; 27 L. J., C. P. 281.

(*u*) Bac. Abr. tit. *Covenant* (E. 2).

(*x*) See *ante*, Chap. V., Sect. 8; Chap. VII., Sect. 10; and see Gorton *v.* Gregory, 3 B. & S. 90; 31 L. J., Q. B. 302.

The subject of the right of parties to sue on a covenant in the case of assignment has been fully treated already (*y*).

Indorsement of writ. — The plaintiff in an action for rent based upon a covenant may indorse his writ specially under Order III., Rule 6, of the Rules of the Supreme Court with the benefit of the various advantages in * regard [*531] to speedy judgment on such a form of writ given by Order XIV. of those Rules: if that is not done, the indorsement "the plaintiff's claim is for £ for arrears of rent" will probably cover all claims for rent, strictly so called, however reserved or payable (*z*).

The statements of claim and other pleadings will be subject to the same rules as in other actions, and must, to speak generally, set out such facts as will give the plaintiff a clear right of action. The action will be tried where the plaintiff proposes or where the preponderance of convenience suggests, as all local venues are abolished by the Rules of the Supreme Court under the Judicature Acts (*a*).

Pleadings. — By the Common Law Procedure Act of 1852 (15 & 16 Vict. c. 76), Sched. B, No. 23, a short form of declaration was provided for actions on covenants in a lease. The Rules of the Supreme Court under the Judicature Act provide a specimen statement of claim applicable to a simple case of non-repair, to which a claim for rent may be added (*b*). Under the former practice it was unnecessary to state the details of the deed (*c*), or the locality of the premises (*d*), nor any fixtures, furniture, &c., as the rent is supposed to issue out of the realty (*e*), or the time when that rent became due. But as the pleadings now are to be statements of facts, such matters as the locality and the date when rent is due should be inserted for the defendant's information (*f*).

It is sufficient to "state the effect" of the covenant "as

(*y*) *Ante*, Chap. VII., Sects. 2, 3.

(*z*) R. S. C. App. A. Part III., sect. 2.

(*a*) R. S. C. Order XXXVI., Rule 1.

(*b*) See Appendix C, No. 9.

(*c*) Sect. 55 of the Common Law Procedure Act, 1852.

(*d*) Davis *v.* Edwards, 3 M. & S. 380.

(*e*) Farewell *v.* Dickenson, 6 B. & C. 251; see, too, Ward *v.* Smith, 11 Price, 19.

(*f*) See, further, Walker *v.* Hatton, 10 M. & W. 249; 2 Dowl., N. S. 263; Hill *v.* Saunders, 1 C. & P. 80.

briefly as possible, without setting out the whole or any part thereof, unless the precise words" of the covenant "or any part thereof are material" (*g*). The defendant may easily obtain inspection of the whole lease if he choose (*h*).

Setting out lessor's title. — The lessor need not set out his title (*i*), for the lessee cannot deny it if he set it out (*k*), although if the plaintiff's title be a derivative one only, he must show how he derives his title and from whom (*l*), and in the case of an executor or administrator suing those arrears of rent only which accrued due during the lifetime of the deceased can be recovered without showing the plaintiff's title (*m*).

If the statement of claim omits to state the lessor's title where that *ought* to be stated, the defendant can get [*532] it struck out or amended * under R. S. C., Order XXVIII., Rule 1 (*n*); otherwise it will be sufficient, at least after verdict (*o*). In many cases — such, for example, as actions by husbands (or their assignees) in right of their wives, in which there were certain special rules — it is not now necessary to follow any technical form so long as the facts pleaded show a right to bring the action (*p*).

Statement of derivative title of defendant. — Where the action is against an assignee of the lessee, it has never been necessary for the plaintiff to set out the several mesne assignments to the defendant, for they do not lie within his knowledge, provided that he state the original demise, and that all the estate and interest of the lessee came to and vested in him (the defendant) by assignment (*q*). It must,

(*g*) R. S. C. Order XIX., Rule 24.

(*h*) R. S. C. Order XXXI., Rule 14.

(*i*) Aleberry *v.* Walby, 1 Stra. 230, 231; 1 Wms. Saund. 233 *a*, n. (2).

(*k*) Beckett *v.* Bradley, 7 M. & G. 994; 2 D. & L. 586; 4 Doug. 213.

(*l*) See, for example, 2 Wms. Saund. 751, 826; Bullen & L. Pl. 209 (3rd ed., 1871); Wild *v.* Baxter, 11 Exch. 816; 1 H. & N. 568; Cuthbertson *v.* Irving, 4 H. & N. 742; 6 Id. 135.

(*m*) Dollen *v.* Batt, 4 C. B., N. S. 760, 771; 1 Chit. Pl. 387 (7th ed.); 2 Id. 406, 408.

(*n*) See Cuthbertson *v.* Irving, 4 H. & N. 742; 6 Id. 135.

(*o*) Hartis *v.* Beavan, 4 Bing. 646.

(*p*) See, for example, Fryer *v.* Coombs, 11 A. & E. 403; Polyblank *v.* Hawkins, 1 Doug. 329; Major *v.* Talbot, Cro. Car. 285; Wood *v.* Day, 1 Moore, 389; Noke *v.* Awder, Cro. Eliz. 373, 436.

(*q*) Bullen & L. Pl. 214 (3rd ed.).

however, be shown that the defendant is the assignee of the term as well as of the premises, for otherwise it might be an assignment of another estate than the term of the lessee. And if the defendant be assignee of part only of the demised premises he should be charged accordingly, and not as assignee of the whole (*r*).

Defences of tenant. — With regard to any defence which the tenant may set up,[1] it must be borne in mind that he can-

(*r*) Grattan *v.* Wall, 2 I. R., Com. L. 484, Exch.

[1] **Defences in suits for rent.** — (*a*) *Nature and degree.* — Defences are, in some respects, more liberally allowed under the "Reformed Procedure" (of the code states) than by the common law practice (of the other states).

They are divisible (under both systems) into total defences and partial defences. The same kind of facts may, under different circumstances, be either total or partial.

Eviction. — For example, total eviction is always a complete defence, whether pleaded in bar at common law (Fitchburg Cotton Man. Co. *v.* Melven, 15 Mass. 268), or set up as such in answer (under the code practice) to all rent *subsequently* accruing. So, likewise, is *partial* eviction (by the weight of authority) if by the *lessor;* but *partial* eviction by a *third party* (under title paramount) is only a defence *pro tanto.* See *ante*, ch. 1, sec. 6, "Eviction of Lessee."

Eviction is no defence to a suit for prior accrued rent. Pepper *v.* Rowley, 73 Ill. 262; Fillebrown *v.* Hoar, 124 Mass. 580; Kessler *v.* McConachy, 1 Rawle (Pa.) 435; Tiley *v.* Moers, 43 Pa. St. 404; Moffat *v.* Strong, 9 Bosw. (N. Y.) 57; Blair *v.* Claxton, 18 N. Y. 529.

It does not (of itself) terminate a lease (Leishman *v.* White, 1 Allen (Mass.) 489), but simply suspends the rent. If lessor restore possession to lessee, and the lessee accept it, the lessee will become liable for the rent subsequently accruing (*per* Woodward, J., in Tiley *v.* Moers, 43 Pa. St. 404, 410).

Constructive eviction is as effectual as actual eviction. It has been held there can be no constructive eviction without an abandonment. Boreel *v.* Lawton, 90 N. Y. 293, 297; and see *per* Andrews, Ch. J. Doubtless there may be a constructive eviction from part without an abandonment of the whole; and there need not be an abandonment if there is a new attornment, under compulsion, to the rightful owner. Eviction is a breach of the covenant of quiet enjoyment. The covenant of quiet enjoyment and the covenant to pay rent are mutual, but not simultaneous, covenants. Quiet enjoyment is a condition precedent to the covenant to pay rent. See note upon "Eviction of Lessee" cited *supra.*

Failure to deliver possession is held a breach of this covenant in America if a third party is in rightful possession at the commencement of the tenancy (Ludden *v.* Stern, 20 Ill. App. 88), otherwise the American authorities are divided upon the question whether it is the duty of lessor to put the lessee in possession of the demised premises.

Mere trespasses. — It is usually held at common law that mere trespasses are not breaches of the covenant of quiet enjoyment, and constitute no defence (even in part) to a suit for rent. Bartlett *v.* Farrington, 120 Mass. 284;

not deny that his landlord had a good title at the time of the demise (*s*), but he may show that his landlord's title has ceased

(*s*) See Parker *v.* Manning, 7 T. R. 537; Langford *v.* Selmes, 3 K. & J. 220; 2 Jur., N. S. 859; Duke *v.* Ashby, 7 H. & N. 600; Blake *v.* Foster, 8 T. R. 487; Wilkins *v.* Wingate, 6 T. R. 62.

Bennet *v.* Bittle, 4 Rawle (Pa.) 339 (entry of lessor without expelling lessee); Elliott *v.* Aiken, 45 N. H. 30; Boston & Worcester R. R. Co. *v.* Ripley, 13 Allen (Mass.) 421; Waterman on Set-off, Recoupment, and Counter-claim (2d ed.), sec. 575.

In Illinois it is held that mere trespasses, though not amounting to an eviction, may be set up as a defence *pro tanto*. Lynch *v.* Baldwin, 69 Ill. 210; Wade *v.* Halligan, 16 Id. 507, 511 (*per* Scates, C. J.); Streeter *v.* Streeter, 43 Ill. 155, 161. Generally claims in contracts in that state, arising out of same transactions, may be set off against torts (Stow *v.* Yarwood, 14 Ill. 424; Brigham *v.* Hawley, 17 Id. 38; Sanger *v.* Fincher, 27 Id. 347), and *vice versa*.

In New York, both under its former common law practice and under the present code (with its statute of counter-claim materially enlarging the common law defences), mere trespasses are not held breaches of contract, and cannot be set up in defence, even *pro tanto* (Edgarton *v.* Page, 20 N. Y. 281; Boreel *v.* Lawton, 90 Id. 293, 297; Drake *v.* Cockroft, 4 E. D. Smith (N. Y.) 34; Mayor &c. *v.* Parker Vein S. S. Co., 21 How. Pr. (N Y.) 289; Walker *v.* Shoemaker, 4 Hun, 579, 580 (*per* Brady, J.); Cram *v.* Dresser, 2 Sandf. (N. Y.) 120; Vibbard *v.* Johnson, 19 Johns. 77; Whitney *v.* Lewis, 21 Wend. 131; Tallmadge *v.* Wallis, 25 Id. 116), though it has been held in several cases that, if the torts could be construed as *also violations* of *covenants*, they might be set up in defence. Walker *v.* Shoemaker, 4 Hun, 579, 581 (damages for failure to repair with care and diligence as agreed); Ayres *v.* O'Farrell, 4 Robt. (N. Y.) 668 (a case which seems in conflict with Boreel *v.* Lawton, 90 N. Y. 293); but whether these cases will be sustained by the Court of Appeals, *quere*.

In Georgia and *Missouri* it has also been held that trespasses by lessor cannot be set up in defence. Brown *v.* Alfriend, 61 Ga. 12, 15 (lessor's cattle eating up lessee's crops); Dimmock *v.* Daly, 9 Mo. App. 354. In some of the other code states it may be that such defences are allowed.

Renewal of liability. — Partial eviction does not (of itself) terminate a lease. Leishman *v.* White, 1 Allen (Mass.) 489. It merely suspends the rent; and if possession is restored, and lessee resume possession, liability will be renewed (*per* Woodward, J., in Tiley *v.* Moers, 43 Pa. St. 404, 410).

Lack of title on part of lessee without an eviction is no defence (Howard *v.* Murphy, 23 Pa. St. 173), lessee being estopped to dispute that lessor had a title at the commencement of the tenancy (see *ante*, ch. 1, sec. 1, note, "Tenancies by estoppel"); but he is not estopped to show subsequent termination of that title (see note, "Tenancies by estoppel"). Seizure of the demised premises terminates both the lessor's title and the lease, and excuses the payment of rent. O'Brien *v.* Ball, 119 Mass. 28; Civil Code Quebec, Art. 1660.

Seizure by public enemy. — It was held, in Pollard *v.* Shaaffer, 1 Dall. (Pa.) 210, a defence to covenant to deliver up in good repair but not to rent.

Termination of tenancy by total destruction of demised thing (leaving no realty or other part of the demised thing in existence). See *ante*, ch. 8,

since the demise (*t*), and may dispute the title of a plaintiff whose claim is derivative only, as in such a case there is no

(*t*) Langford *v.* Selmes, Duke *v.* Ashby, *supra;* see, too, Simons *v.* Farren, 1 Bing. N. C. 126, 272; Cuthbertson *v.* Irving, 4 H. & N. 742; 6 Id. 135.

sec. 1, note, "Termination by total destruction"; by surrender (see *ante*, ch. 8, sec. 3, notes), or other termination is a defence to all rent unaccrued (subject to operation of apportionment statutes).

Misrepresentations. — Although a principle analogous to the rule of caveat emptor prevails in landlord and tenant law, yet where false material representations amount to a warranty, or are knowingly made, the lessee may, if he act seasonably, rescind the lease; and it is held in some states that he may recoup damages in a suit for rent. Stubblefield *v.* Soule, 21 Ill. App. 154; Burroughs *v.* Clancey, 58 Ill. 30; Avery *v.* Brown, 31 Conn. 398; Cage *v.* Phillips, 38 Ala. 382.

Suppressio veri. — Likewise a fraudulent concealment of facts which it is the duty of lessor to reveal, affords a defence in some states. For example, the fraudulent concealment of the existence of bad smells on the premises, injurious to health, causing sickness to the inmates, and an abandonment under advice of a physician, was held a defence in Wallace *v.* Lent, 1 Daly (N. Y.) 481. In Crump *v.* Morrell, 35 Leg. Int. 374, and 12 Phila. 249, concealment of knowledge of dangerous condition of drains, causing sickness and abandonment under advice of physician after inspection by health officer, was held a proper defence.

In Rhinelander *v.* Seaman, 13 Abb. N. Cas. (N. Y.) 455, n., it was held that lessee might counter-claim damages caused by fraudulent concealment of fact that demised premises had previously been used for a house of prostitution.

If there has been no fraudulent concealment, lessee cannot counter-claim. Chadwick *v.* Woodward, 13 Abb. N. Cas. (N. Y.) 441; Franklin *v.* Brown, 53 N. Y. Superior Ct. 474. *There is a host of special defences,* too numerous to be mentioned here.

Affirmative relief. — Lessee, where he is entitled to relief which he cannot set up in defence (or where he has an election of remedies), may recover damages by separate independent suit, either in tort or contract. Lessee recovered damages of lessor in Minor *v.* Sharon, 112 Mass. 477; and Cæsar *v.* Karutz, 60 N. Y. 229, for fraudulently concealing the fact that demised premises were infected with small-pox.

Forms of defence. — The principal varieties of partial defences are set-off, recoupment and counter-claim. Either of these may, under circumstances, be a total defence.

Counter-claim. — Of these, counter-claim is peculiar to the code states. It is a mode of defence by a pleading in the nature of a cross action in which the defendant may obtain affirmative relief against the plaintiff, and may recover a judgment if the balance of damages shall be in his favor. It seems designed to take the place both of set-off and recoupment (2 Estee's Pleadings (3d. ed.), secs. 3360–3370), although it is broader than both together.

For a full discussion of it, see Estee's Pleadings, secs. 3360–3370, Bliss on Code Pleading (2d. ed.), ch. 23, and Pomeroy's Remedies and Remedial Rights, secs. 581, 582. It exists in all the code states, with greater or less variations. Several of the states have separate statutes for set-off, but the

estoppel operating against the tenant (*u*). Any set-off or counter-claim may be pleaded as in ordinary actions. Entry

(*u*) Carrick *v.* Blagrove, 1 B. & B. 531; Weld *v.* Baxter, 11 Exch. 816; 1 H. & N. 568; 26 L. J. Ex. 112; Dollen *v.* Batt, 4 C. E., N. S. 76; Cuthbertson *v.* Irving, 4 H. & N. 742; 6 Id. 135; 1 Wms. Saund. 233 a; 2 Bing. N. C. 420, n. (2).

majority include it under counter-claim. The code practice differs from the common law practice in this: that where defendant's claims arise out of the same transaction in which he is sued, he can, in the code states, enforce it *only* by counter-claim, while at common law he has an election in some cases to recoup, or bring a separate action against the plaintiff. The defences which may be set up by counter-claim in New York include causes of action arising out of or connected with the contract or transaction set forth in the plaintiff's complaint, or, in case the action is an action on contract, any other independent cause of action on contract existing at the commencement of the suit. N. Y. Code C. P. sec. 501, cl. 1, 2. Provisions in the other code states are similar.

Under the above broad language, damages, liquidated or unliquidated, resulting from breaches of dependent or independent covenants, may be counter-claimed, and if they exceed plaintiff's damages, a judgment may be recovered against the plaintiff.

Set-off. — This is a defence originally unknown to the common law, but has been created by statute. Waterman on Set-off, Recoupment and Counter-claim, sec. 10.

It is a counter and independent demand against the plaintiff, not necessarily arising out of the same transaction, but it must be for a liquidated amount. Waterman on Set-off, etc., secs. 1, 2, 3, 8, 10, etc. In these respects it differs from recoupment.

It is a form of defence which prevails generally under the present common law practice; but under the "Reformed Procedure" in the code states it is usually, though not always, made by way of counter-claim. See *supra*. The first statute of set-off was 2 Geo. 2, ch. 22, which has been generally re-enacted with modifications in the United States. 2 Estee's Pleadings (3d. ed), sec. 3364.

Recoupment. — This is an equitable set-off, limited to breaches of the particular contract sued on, and including either liquidated or unliquidated damages. It is not of statutory origin and was not formerly known at common law, and it is not now universal. It is held not to exist in New Jersey except so far as conferred by statute. Price's Ex'rs. *v.* Reynolds, 39 N. J. L. 171; Hunter *v.* Reiley, 43 Id. 480. Beasley, Ch. J., said in the former case: "The doctrine of recoupment is unknown to the common law, and exists in this state only by virtue of the enabling provision in the one hundred and twenty-ninth section of the present practice act," and is confined to actions upon contracts not under seal.

It was originally confined to damages for breaches of mutual and dependent covenants, and is now in some states. For instance, breach of lessor's express covenant to repair was held no defence in a suit for rent in Etheridge *v.* Osborn, 12 Wend. (N. Y.) 529; Allen *v.* Pell, 4 Id. 505; Wilkes *v.* Steel, 14 Q. B. (Ont.) 570; and in Leavitt *v.* Fletcher, 10 Allen (Mass.) 119, 121; and in Royce *v.* Guggenheim, 106 Mass. 201, the dicta of Justice Gray, if it

and eviction may be set up in answer to an action for rent due under a covenant (*x*); provided there be really an eviction (*y*), for which (it may be remarked) no physical expulsion is required (*z*), and eviction by a stranger, if lawful, may also be set up as a defence (*a*). Any tender of the rent

(*x*) Dalston *v.* Reeve, 1 Ld. Raym. 77; Walker's case, 3 Co. R. 22 b; Morrison *v.* Chadwick, 7 C. B. 266; 13 L. J., C. P. 189.

(*y*) Dunn *v.* Di Nuovo, 3 M. & W. 105; 3 Sc. N. R. 487.

(*z*) Upton *v.* Townend, 17 C. B. 30, 64; 25 L. J., C. P. 44.

(*a*) Simons *v.* Farren, *supra*; Cuthbertson *v.* Irving, *supra*; Jordan *v.* Twells, Cas. temp. Hard. 172; see, too, 1 Wms. Saund. (ed. 1871) 208, n. (2); Hill *v.* Saunders, 4 B. & C. 529.

correctly indicates the law, shows that such is the present law in Massachusetts as well as in England.

This doctrine applies (where it is in force), to all independent covenants. Watts *v.* Coffin, 11 Johns. (N. Y.) 495. It is now, however, established in the code states (by the statutes of counter-claim), that breaches of all lessors' covenants may be set up in defence.

This was the doctrine in New York before the passage of the statute of counter-claim, and is by that statute the doctrine since. Ives *v.* Van Epps, 22 Wend. 155; Westlake *v.* De Graw, 25 Id. 669, 672 (*per* Nelson, Ch. J.); Reab *v.* McAlister, 8 Id. 109 (Walworth, Chan., gave the opinion, and this case was called by Bronson, J., in Batterman *v.* Pierce, the celebrated case of Reab *v.* McAlister); Batterman *v.* Pierce, 3 Hill, 171, 177; Nichols *v.* Dusenbury, 2 N. Y. 283; Spalding *v.* Vandercook, 2 Wend. 431; Whitbeck *v.* Skinner, 7 Hill, 53; Dorwin *v.* Potter, 5 Denio, 306; Walker *v.* Shoemaker, 4 Hun, 579, 581; Cook *v.* Soule, 56 N. Y. 420; Myers *v.* Burns, 35 Id. 269.

It is the more general modern doctrine in the American states, both those under the "Reformed Procedure" and under the common law practice. Bostwick *v.* Losey, 35 N. W. Rep. (Mich.) 246 (damages for breach of lessor's express covenant to repair recouped); Stewart *v.* Lanier House Co., 75 Ga. 582 (cov. to repair); Kiernan *v.* Germain, 61 Miss. 498, 503 (*per* Campbell, C. J.); Prescott *v.* Otterstatter, 85 Pa. St. 534 (breach of covenant to repair); Depuy *v.* Silver, 1 Clark (Pa.) 388 (breach of cov. for road privilege, &c.); Lunn *v.* Gage, 37 Ill. 19 (covenant to repair); Pepper *v.* Rowley, 73 Ill. 262, 266 (*per* Scott, J., that damages for breach of any covenant in lease may be recouped); Lindley *v.* Miller, 67 Ill. 244, 246, 247 (*per* Walker, J., that damages caused by lessor's breaches of covenants may be recouped in suits or in proceedings for distress); Christy *v.* Ogles' Ex'r., 33 Ill. 295.

In Texas lessee may plead by way of reconvention to suit for rent damages for lessor's failure to repair. Coleman *v.* Bunce, 37 Tex. 171.

It is sometimes held that this defence cannot be made without previous notice has been given (Barber *v.* Rose, 5 Hill, 76), and the failure to repair must be a breach of a covenant in demise. Breach of a subsequent parol agreement is not sufficient (Reeves *v.* Hyde, 14 Ill. App. 233), though in states where lessor is required by statute to make repairs, it has been said that damages for breach of such obligation might be recouped (*per* Warner, C. J., in Guthman *v.* Castleberry, 49 Ga. 272).

must, to be an answer to the action, be made on the day when it is due (*b*). It appears to have been for-
[*533] merly held that a plea that the *demand had been satisfied by distress was a bad plea when the action was on a covenant (*c*), but it would now be in any case probably upheld under the equitable jurisdiction possessed by all courts (*d*).

Statute of limitations. — By 3 & 4 Will. 4, c. 42, s. 3, "all actions of debt for rent upon an indenture of demise, all actions of covenant or debt upon any bond or other specialty, shall be commenced and sued within twenty years after the cause of such actions or suits, but not after." The 3 & 4 Will. 4, c. 27, s. 42, takes away from an incumbrancer upon land in all cases the right of recovery as against the land for more than six years' arrears of rent or interest. The 3 & 4 Will. 4, c. 42, s. 3, however, restores the personal remedy against the debtor on the covenant (*e*). Therefore, an action on a covenant for rent may be brought within twenty years, and is not limited to six years (*f*).

It is now well established that so long as the relation of landlord and tenant subsists as a legal relation the landlord's right to rent is not barred by non-payment of rent for any length of time (*g*), although there may be a limit on the amount of arrears recoverable.

Defence of illegality. — Any illegality in the contract will be an answer to the action, as, for instance, that the premises were knowingly let contrary to the Public Health Act, or for the purpose of carrying on a trade prohibited by statute (*h*),

(*b*) Brownlow *v.* Hewley, 1 Ld. Raym. 83; Hume *v.* Peploe, 8 East, 168; Poole *v.* Tunbridge, 2 M. & W. 223; Dobie *v.* Larkin, 10 Exch. 776; but see Johnson *v.* Clay, 1 Moo. 200; 7 Taunt. 486.

(*c*) Aldridge *v.* Howard, 4 M. & G. 921.

(*d*) Judicature Act, 1873, sect. 24.

(*e*) Hunter *v.* Nockold, 1 Mac. & Gord. 640; 1 Hall & Tw. 644; Humfery *v.* Gery, 7 C. B. 567.

(*f*) Paget *v.* Foley, 2 Bing. N. C. 679; Strachan *v.* Thomas, 12 A. & E. 536; Manning *v.* Phelps, 10 Exch. 59.

(*g*) Archbold *v.* Scully, 9 H. L. Cas. 360; 7 Jur., N. S. 1169; see, too, Re Turner, 11 Irish Ch. Rep. 304.

(*h*) Gaslight Co. *v.* Turner, 6 Bing. N. C. 324; Flight *v.* Clarke, 13 M. & W. 155.

or for a brothel (*i*), or for purposes of prostitution (*k*), or for blasphemous lectures (*l*).

Interest. — Interest may be recovered on rent due on a fixed day as damages (*m*).

Specialty debt ranks with simple contract debts. — The importance formerly attaching to debts due under covenant, by reason of their priority over simple contract debts, in ranking against the assets of deceased persons, has been put an end to as regards the estates of all persons dying after the 1st of January, 1870, by the act 32 & 33 Vict. c. 46.

Sect. 2. — *Action on Simple Contract for Rent.*[1]

Where the rent is payable under an express contract to pay it, but not under seal, the principles governing ordinary actions for the *recovery of money under a [*534] simple contract will apply, as will most of the rules already noticed in reference to covenants to pay rent, except in so far as they are peculiar to matters of specialty.

But it must be particularly noticed that no rent under a simple contract promise to pay it can be recovered except within six years next after it has become due or has been acknowledged in writing (*n*). It is undoubtedly a good defence that the landlord has distrained, and from the distress has *satisfied* his claim for rent (*o*).

A mere oral agreement to reduce the rent reserved will not create a new demise, and the full rent will still be recoverable (*p*).

(*i*) Smith *v.* White, L. R., 1 Eq. 626.

(*k*) Girardy *v.* Richardson, 1 Esp. 13; Crisp *v.* Churchill, cited in 1 B. & P. 340; Howard *v.* Hodges, 1 Selw. N. P. 80 (13th ed.); Jennings *v.* Throgmorton, R. & Moo. 251; Pearse *v.* Brooks, L. R., 1 Ex. 213; 4 H. & C. 358; 35 L. J., Ex. 134; but see Appleton *v.* Campbell, 2 C. & P. 347.

(*l*) Cowan *v.* Milbourn, L. R., 2 Ex. 230; 36 L. J., Ex. 124.

(*m*) See Skerry *v.* Preston, 2 Chit. R. 245; 3 & 4 Will. 4, c. 42, s. 28.

(*n*) 21 Jac. 1, c. 16.

(*o*) Lear *v.* Edmonds, 1 B. & Ald. 157; Lees *v.* Wright, 1 D. & R. 391; see also Efford *v.* Burgess, 1 Moo. & R. 23.

(*p*) Crowley *v.* Vitty, 7 Exch. 319; 21 L. J., Ex. 135; see Kelly *v.* Patterson, L. R., 9 C. P. 681.

[1] See *ante*, sec. 1, notes.

SECT. 3. — *Implied Contract for Rent.*

An action may also be maintained for the recovery of rent where there is no express contract to pay it, but the law will imply such a contract[1] from some privity either of contract or of estate between the parties in relation to the subject-matter of the demise (*q*), and it is immaterial whether, if there be a demise, it be by deed, written contract not under seal, or parol only. It will be convenient in treating of this implied contract to distinguish between that which arises where there has been an actual demise in some form, and that which arises from use and occupation only, as in the latter case it is not strictly rent which is recovered, and the subject therefore is best treated separately.

Any words in a demise which are sufficient to create a privity of contract between the parties will enable the landlord to maintain an action on an implied contract to pay the rent named, as, for example, where the words "yielding and paying" so much occur (*r*), and as between lessor and lessee an action can be maintained before any entry (*s*). The rules with regard to the necessity of setting out the titles of the parties (*t*) and other matters in the pleadings will be the same as in an action for rent due under a covenant. The limitation on actions on a contract implied from the demise will be twenty or six years according as the demise is under seal or not (*u*).

(*q*) Ward *v.* Lumley, 5 H. & N. 87, 656; 29 L. J., Ex. 322.

(*r*) See Bower *v.* Hughes, 13 C. B. 765, 744; and see *ante*, Chap. IV., Sect. 5, and Chap. IX., Sect. 2.

(*s*) Bellasis *v.* Burbrick, 1 Salk. 209; 1 Ld. Raym. 170; Bull *v.* Sibbs, 8 T. R. 327; and per Willes, J., in Smith *v.* Scott, 6 C. B., N. S. 781.

(*t*) *Ante*, 531.

(*u*) 3 & 4 Will. 4, c. 42, s. 3; 21 Jac. 1, c 16.

[1] See *ante*, ch. 6, sec. 1, note, "Implied tenancies," and *post*, ch. 14, sec. 1, note, "Actions for use and occupation."

* CHAPTER XIV. [*535]

COMPENSATION FOR USE AND OCCUPATION.

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SECT. 1. — *What it is, and when it arises.*

Definition. — We have now to consider the case of a relation of landlord and tenant existing without any arrangement at all for the payment of rent properly so called, and the case in which the law implies from the conduct of the parties a promise to compensate the landlord for his loss by reason of the tenant's occupation of his premises. The action which can in such case be maintained is not to recover rent, but for damages due on an implied agreement to pay for the use of the landlord's property (*a*), and arises rather out of what may be called a quasi-tenancy than from the strict relation of landlord and tenant. To quote the words of Lord Ellenborough in The Dean and Chapter of Rochester *v.* Pierce (*b*), "The action for use and occupation does not necessarily suppose any demise; it is enough that the defendant used and occupied the premises by the permission of the plaintiff."

May be recovered, though special contract. — This form of action is at common law admissible where there has been an actual demise (*c*), but by virtue of the statute 11 Geo. 2, c. 19, s. 14, the proof at the trial of a demise does not nonsuit the plaintiff, unless it be by deed (*d*), the rent reserved being

(*a*) See Smith *v.* Eldridge, 45 C. B. 236; Smith *v.* Twoart, 2 M. & G. 841.

(*b*) 1 Camp. 466.

(*c*) See *per* Bramwell, B., in Churchward *v.* Ford, 2 H. & N. 446; see, too, Reade *v.* Johnson, Cro. Eliz. 242; Clerk *v.* Polady, Id. 809.

(*d*) See also Dungay *v.* Angove, 2 Ves., jun. 307.

used as a measure of the *quantum* of damages payable to the plaintiff (*e*): and now the *form* of action is of little importance, especially as the powers of amendment at all stages of an action are now very large (*f*). It is, however, of importance to consider in what cases this compensation is payable when there is no contract of demise. It has [*536] been not *uncommonly said that an action for use and occupation is always founded on some contract or promise, express or implied (*g*), but this is not strictly correct, as all that the law says is, that the proof of an express contract of demise is not to put an end to an action for use and occupation. It may be more correct to say that the defendant must have held or occupied the premises as tenant thereof to the plaintiff, or by his permission or sufferance (*h*). In the absence of an express lease or agreement for a lease at a fixed rent, where the premises have been used or occupied by the defendant by the permission or sufferance of the plaintiff, the law will imply a contract or promise by the defendant to pay to the plaintiff a reasonable sum for such use and occupation (*i*).[1] This is so notwithstanding

(*e*) See 6 A. & E. 839, n. (*a*).

(*f*) R. S. C. Ord. XXVIII. See Lord Hanmer *v.* Flight, 24 W. R. 346 (C. P.).

(*g*) See Birch *v.* Wright, 1 T. R. 378, 387; see, too, the judgment in Beverley *v.* Lincoln Gaslight and Coke Co., 6 A. & E. 829, p. 839, n.; and Gibson *v.* Kirk, 1 Q. B. 850, 855; Churchward *v.* Ford, 2 H. & N. 446; 26 L. J., Ex. 354.

(*h*) See Marquis of Camden *v.* Batterbury, 5 C. B., N. S. 808; 7 Id. 864; 28 L. J., C. P. 335; Levi *v.* Lewis, 6 C. B., N. S. 766; 9 Id. 872.

(*i*) Hellier *v.* Silleox, 19 L. J., Q. B. 295, explained in Churchward *v.* Ford, 2 H. & N. 446, 449, 450; see also Hyde *v.* Morkes, 5 C. & P. 42; Holford *v.* Hatch, 1 Dougl. 183; Marwood *v.* Waters, 13 C. B. 280; Hall *v.* Burgess, 5 B. & C. 332.

[1] **Actions for use and occupation.** — (*a*) *Nature.* — This is an action for the use of premises, under express or implied tenancies (see *ante*, ch. 6, sec. 1, note, "Implied tenancies") where the price has not been determined by the parties. Any one occupying the premises of another, with his consent, having reason to believe that payment will be required, is liable to this action. Abeel *v.* Radcliff, 15 Johns. (N. Y.) 505; Little *v.* Martin, 3 Wend. (N. Y.) 219; Crommelin *v.* Theiss, 31 Ala. 412, 420; Hoagland *v.* Crumb, 113 Ill. 365, 370, 371; Ryerss *v.* Farwell, 9 Barb. (N. Y.) 615; (lessee under sealed lease occupying after his property assigned in bankruptcy) Brennan *v.* Jack, 3 Russ. & Geld. (N. S). 368.

(*b*) *Form of action.* — This, at common law, is *assumpsit* (Curtis *v.* Treat, 21 Me. 525; Fox *v.* Corey, 41 Id. 81; Patterson *v.* Stoddard, 47 Id. 355; Rollins

there is a lease in writing containing a condition precedent which has not been performed by the plaintiff (*k*).

Plaintiff not to be non-suited although special contract appear. — Although not properly based on a demise, the claim for this compensation may be based on a mere agreement for a lease, coupled with proof of possession thereunder (*l*), notwithstanding such agreement may be under seal; for, as was pointed out in Elliott *v.* Rogers (*m*), the tenancy is created by the entry with the plaintiff's permission, and not by the deed (*m*). The statute 11 Geo. 2, c. 19, s. 14, already re-

(*k*) Smith *v.* Eldridge, 15 C. B. 236; Smith *v.* Twoart, 2 M. & G. 841.

(*l*) See, for example, Hickman *v.* Machin, 4 H. & N. 716.

(*m*) 4 Esp. 59; see, too, Bannister *v.* Usborne, Peake Ev. 242.

v. Moody, 72 Id. 135), in Massachusetts contract, and in the code states a civil action (see *ante*, ch. 13, sec. 1, notes).

(*c*) *Essentials.* — The relation of landlord and tenant must exist.

(*d*) *When the action will not lie.* — It will not lie against a disseizor (Allen *v.* Thayer, 17 Mass. 299); nor a trespasser (Lyman *v.* Ackerman, 20 Wis. 454); nor an adverse claimant (Kittredge *v.* Peaslee, 3 Allen (Mass.) 235; Boston *v.* Binney, 11 Pick. (Mass.) 1; Keyes *v.* Hill, 30 Vt. 759; Le Cain *v.* Hosterman, 2 Russ. & Ches. (N. S.) 229; Dudding *v.* Hill, 15 Ill. 61; Pott. *v.* Leshor, 1 Yeates (Pa.) 576; Langford *v.* United States, 101 U. S. 341).

A recovery in ejectment (Strong *v.* Garfield, 10 Vt. 502) or in a real action (Larrabee *v.* Lumbert, 34 Me. 79) against occupant is a bar to a subsequent suit *in assumpsit* for the occupation.

The remedy must be sought in trespass for mesne profits or other form of tort.

It will not lie against a judgment debtor who disputes validity of levy (Wyman *v.* Hook, 2 Greenl. (Me.) 337); nor a mortgagor in possession (Mayo *v.* Fletcher, 14 Pick. (Mass.) 525, 533); nor one claiming to be a co-tenant with the owners (Flood *v.* Flood, 1 Allen (Mass.) 217); nor a casual occupant, if the circumstances negative a tenancy (Mitchell *v.* Pendleton, 21 Ohio St. 664; Hall *v.* Jacobs, 7 Bush (Ky.) 595); nor upon an agistment contract (Howard *v.* Ransom, 2 Aik. (Vt.) 252); nor (at common law) against a tenant at sufferance (see *ante*, ch. 6, sec. 5, note, "Tenancy at sufferance"), though in some states a tenant holding over, with consent, may at election of lessor be treated either as a tenant or a trespasser (see *ante*, ch. 5, sec. 2, note, "Holding over," etc.). In Massachusetts a tenant at sufferance is now made liable by statute (Pub. Sts. ch. 121, sec. 3).

(*e*) *Occupants entering under purchase contracts* afterwards completed are not liable for the intervening occupation (ordinarily) in any form of action.

If the contract fail of completion through the fault of the vendee, he is, by many authorities, liable for the occupation *in assumpsit*. By other authorities he is liable in trespass, and by others still, either *in assumpsit* or trespass at the election of the vendor. See *ante*, ch. 6, sec. 8, note, "Whether vendee is a tenant."

ferred to, is at first sight somewhat ambiguous. The words of the section are as follows: "To obviate some difficulties that many times occur in the recovery of rents where the demises are *not by deed*, be it enacted that it shall and may be lawful to and for the landlord or landlords, where the agreement is *not by deed*, to recover *a reasonable satisfaction* for the lands, tenements or hereditaments *held or occupied* by the defendant or defendants, in an action *on the case*, for the use and occupation of what was *so held or enjoyed;* and if in evidence on the trial of such action any parol demise or any agreement (not being by deed) whereon a certain rent was reserved shall appear, the plaintiff in such action shall not therefore be non-suited, but may make use thereof as an evidence of the *quantum* of the damages to be recovered." It is clear after the decision in Elliott *v.* Rogers, that "agreement" here must be read as equivalent to "instrument of demise," and not to an agreement for a demise as the term would now be used. A landlord will also be entitled [*537] to sue * for compensation for the use and occupation of his property where a lease is not executed by the lessor, but the lessee enters and enjoys the property during the term, as there is in such a case in truth no demise (*n*). Even a lease under seal, delivered formally as a deed but not intended to operate as such until the tenant pays 100*l.* for fixtures, &c., or performs some other condition, will be considered only as an escrow, and will not prevent an action for use and occupation (*o*).

Action not maintainable when. — To entitle a man to this compensation there must have been some tenancy, express or implied, between the plaintiff and the defendant during the period in respect whereof the compensation is claimed, and it is not enough that the plaintiff was really entitled to the property (*p*).[1] For example, where the defendant occu-

(*n*) See Pitman *v.* Woodbury, 3 Exch. 4; Swatman *v.* Ambler, 8 Exch. 72; How *v.* Greek, 3 H. & C. 391; 34 L. J., Ex. 4.

(*o*) Gudgen *v.* Bessett, 6 E. & B. 986; Millership *v.* Brooks, 5 H. & N. 797.

(*p*) Marquis of Camden *v.* Batterbury, *supra*.

[1] See *ante*, note, "Actions for use and occupation."

pied as tenant to another person, from whom he obtained the possession (*q*), or as a mere wrongdoer or wilful trespasser (*r*), no such action could be maintained.

Nor before entry. — A lessee who has never entered to take possession as tenant (*s*), or an assignee of the term who has never entered to take possession as such, will not be liable to an action for use and occupation (*t*), as the tenant in such cases has a mere interesse termini. Entry, however, by one of several persons jointly entitled will suffice to render all liable (*u*). So a husband is not liable in an action for use and occupation to pay for the enjoyment of a house by his wife *dum sola;* such occupation not having been by him, nor at his request (*x*).

When the title is in dispute. — It has once been held, that an action for use and occupation will not lie where the title is in dispute, ejectment being the proper remedy. This was decided in a case before the Court of King's Bench by Lord Kenyon, C. J., wherein the action was brought against the tenant for rent, while the heir at law and a devisee were contesting their right to the premises (*y*). But it is to be observed that an ejectment could not be maintained in such case, either by the heir or the devisee, because the outstanding term in the defendant would afford a complete defence to such action, and it may be now taken to be the * law that the proper remedy is by distress (*z*), or by [*538] action for rent, or for use and occupation (according

(*q*) Cripps *v.* Blank, 9 D. & R. 480; Marquis of Camden *v.* Batterbury, 5 C. B., N. S. 808; Id. 864; 28 L. J., C. P. 335; Churchward *v.* Ford, 2 H. & N. 446.

(*r*) Tew *v.* Jones, 13 M. & W. 12; Turner *v.* Cameron's Coalbrook Steam Coal Co., 5 Exch. 932; Churchward *v.* Ford, *supra.* See, too, Levi *v.* Lewis, 6 C. B., N. S. 706; 9 Id. 872.

(*s*) Edge *v.* Strafford, 1 C. & J. 391, 398; Lowe *v.* Ross, 5 Exch. 553. See, also, Towne *v.* D'Heinrich, 13 C. B. 892; 22 L. J., C. P. 219. See, too, Woolley *v.* Watling, 7 C. & P. 610; Jones *v.* Reynolds, Id. 335; 4 A. & E. 805.

(*t*) How *v.* Kennett, 3 A. & E. 659; Lowe *v.* Ross, 5 Exch. 556; Jones *v.* Reynolds, 7 C. & P. 335.

(*u*) Electric Telegraph Co. *v.* Moore, 2 F. & F. 363. See, too, Glen *v.* Dungey and Another, 4 Exch. 61.

(*x*) Richardson *v.* Hall, 1 Brod. & B. 50.

(*y*) MS. Hil. T. 37 Geo. 3.

(*z*) Lloyd *v.* Davies, 2 Exch. 103; Moss *v.* Gallimore, 1 Doug. 279; 1 Smith's L. C. 629 (7th ed.).

to the nature of the demise) for the rent (*a*). Indeed it not unfrequently happens in actions for use and occupation that the plaintiff's title to the rent, as reversioner or otherwise, is the very point to be decided (*b*).

Sect. 2. — *By whom an Action is maintainable.*[1]

By "the landlord or landlords." — The 11 Geo. 2, c. 19, s. 14, authorized "the landlord or landlords" to maintain an action on the case for use and occupation (*c*), and this agrees with the common law in actions of debt, and now applies to all actions for use and occupation. In order, therefore, to recover this compensation the plaintiff must show that he is landlord of the defendant in respect of the premises held or occupied by him. It is not sufficient that the plaintiff has a good legal title to the property which would enable him to maintain ejectment; but some possession or enjoyment, such as to amount to a letting at least by implication, must be proved (*d*). Therefore the owner of land cannot recover this compensation against a mere wrongful trespasser (*e*), nor against a person who occupied as tenant to another person from whom he obtained the possession (*e*).

Any tenancy sufficient. — But any tenancy, or agreement for a tenancy, as between the plaintiff and the defendant (coupled with entry or possession thereunder) is sufficient, ex. gr. a mere tenancy at will (*f*), or even a tenancy on

(*a*) See, for instance, Rawson *v.* Eicke, 7 A. & E. 451; Voller *v.* Carter, 4 E. & B. 173.

(*b*) See Hickman *v.* Machin, 4 H. & N. 716; Fursdon, executrix, &c., *v.* Clogg, 10 M. & W. 572; Cornish *v.* Searell, 8 B. & C. 471; Phillips *v.* Pearce, 5 B. & C. 433; Steele *v.* Mart, 4 B. & C. 272; Rawson *v.* Eicke, 7 A. & E. 451; Selby *v.* Browne, 7 Q. B. 620.

(*c*) *Ante*, 535.

(*d*) Cripps *v.* Blank, 9 D. & R. 480; Marquis of Camden *v.* Batterbury, 5 C. B., N. S. 808; 7 Id. 864; 28 L. J., C. P. 335; Turner *v.* Cameron's Coalbrook Steam Coal Co., 5 Exch. 932; Churchward *v.* Ford, 2 H. & N. 446.

(*e*) Tew *v.* Jones, 13 M. & W. 12; Turner *v.* Cameron's Coalbrook Steam Coal Co., and Churchward *v.* Ford, *supra*.

(*f*) Howard *v.* Shaw, 8 M. & W. 118.

[1] See *ante*, sec. 1, note, "Actions for use and occupation."

sufferance (*g*). But a mortgagor who remains in possession by the permission or sufferance of the mortgagee is not a tenant to the mortgagee (even at will or at sufferance), so as to render him liable to an action for use and occupation (*h*). A mere agreement for a lease, whether oral or in writing, coupled with proof of an entry thereunder by the defendant, is sufficient (*i*), notwithstanding it may be void and inoperative as a lease in regard to the term of years therein mentioned (*k*).

* **By surviving lessor.** — A surviving lessor may sue [*539] in his own name for use and occupation had subsequent to the death of his co-lessor (*l*), and to recover any rent which became due in the lifetime of his co-lessor he may sue as survivor (*m*).

By lessee who has sublet. — We have seen that rent is strictly incident to a reversion, but where a tenant has sublet at a rent for his whole term, and therefore has in effect, though not in words, assigned his term, he may still recover the amount agreed as rent from the sub-tenant as a compensation for the use and occupation of the premises (*n*), as may also his legal personal representative (*o*). And this was extended in Levi *v.* Lewis (*p*) to a case where the tenant subletting was himself only liable to his landlord for use and occupation. In that case a lessee had sublet for his whole term, and upon the expiration of both demises, the sub-lessee applied to the superior landlord to become his tenant, but such landlord declined, and referred him to the lessee as being his tenant; and the sub-lessee continued to occupy as before. It was held, in an action by lessee against sub-tenant for the subsequent use and occupation, that there

(*g*) Alford *v.* Vickery, 1 Car. & M. 280; *per* Parke, J., Jenner *v.* Clegg, 1 Moo. & Rob. 213; Bayley *v.* Bradley, 5 C. B. 396.

(*h*) *Ex parte* Wilson, 2 V. & B. 252; Moss *v.* Gallimore, 1 Doug. 283; 1 Smith, L. C. 629 (7th ed.); Trent *v.* Hunt, 9 Exch. 14, 22; Jolly *v.* Arbuthnot, 28 L. J., Ch. 547, 550.

(*i*) See Walsh *v.* Lonsdale, *ante*, 86.

(*k*) De Medina *v.* Polson, Holt, N. P. C. 47.

(*l*) Wheatley *v.* Boyd, 7 Exch. 20.

(*m*) Israel *v.* Simmons, 2 Stark. R. 356; see, also, Cox *v.* Knight, 18 C. B. 645; 25 L. J., C. P. 314.

(*n*) Baker *v.* Gostling, 1 Bing. N. C. 19; Pollock *v.* Stacey, 9 Q. B. 1033; Levi *v.* Lewis, 6 C. B., N. S. 766; and see Beardmore *v.* Wilson, L. R., 4 C. P. 57.

(*o*) Baker *v.* Gostling, *supra*.

(*p*) 6 C. B., N. S. 766; 28 L. J., C. P. 304; 9 C. B., N. S. 872.

was evidence to go to the jury from which they might infer an agreement by the defendant to pay the plaintiff for such use and occupation; especially as after the commencement of such action the superior landlord had received rent from the plaintiff for the occupation subsequent to the expiration of his lease (*p*). And a similar decision was come to in the case of Green *v.* London Cemetery Co. (*q*). There, a person having an agreement for a lease to himself, sublet part of the premises, and then agreed that the lease should be granted to another person, instead of himself, which was accordingly done: it was held, that the substituted lessee might maintain an action for use and occupation against the subtenant for the current quarter's rent which afterwards became due.

Effect of subsequent mortgage by landlord. — The right to compensation will not be defeated by a subsequent mortgage of the landlord's interest (*r*), nor by the existence of a previous mortgage, unless the mortgagee has compelled the tenant under threat of ejectment to pay to him the sum which would have been due (*s*), in which case, however, he still remains tenant to the mortgagor (*t*).

Effect of landlord having ejected. — If a landlord has taken proceedings to eject his tenant and recovered judgment, the after attornment creates a new relation of land-
[*540] lord * and tenant between the parties, and the landlord will thenceforth be entitled to compensation for the use and occupation of the premises (*u*).

Corporations aggregate. — When a corporation aggregate has demised by parol or by instrument not under seal, it cannot recover rent on the demise, as it has no power to demise except by deed;[1] but if the tenant has entered into

(*p*) 6 C. B., N. S. 766; 28 L. J., C. P. 304; 9 C. B., N. S. 872.
(*q*) 9 C. & P. 6.
(*r*) See *ante*, 50.
(*s*) Id.
(*t*) See Wheeler *v.* Branscombe, 5 Q. B. 373.
(*u*) Newport *v.* Hardy, 2 D. & L. 921.

[1] Corporations may demise in same way as individuals in United States. See *ante*, ch. 1, notes. "Can corporations convey property without using the corporation seal?" and "corporation seal," etc.

possession of the property, the corporation may recover compensation for the use and occupation of the same (*x*).

Incumbent. — An incumbent whose living has been duly sequestered cannot recover anything for the subsequent use and occupation of the glebe lands, because such occupation is not by his permission or sufferance, but by that of the bishop (*y*). The sequestrator holds merely as bailiff of the bishop (*z*).

By churchwardens and overseers. — Churchwardens and overseers may recover compensation for the use and occupation of parish property demised by their predecessors, but vested in them as a quasi body corporate by 59 Geo. 3, c. 12, s. 17 (*a*), unless the property be vested in trustees (*b*); and this will apply to all the buildings, lands and hereditaments *belonging to the parish*, not merely where the rents and profits are applicable to the relief of the poor, but where they are applicable to those purposes for which church rates are levied (*c*). It does not extend to copyholds (*d*).

If the occupation took place partly in the time of the plaintiff's predecessors in office, and by their permission, the statement of claim should be framed accordingly (*e*).

By trustees or cestui que trust. — Prior to the Judicature Act, it was clear that a *cestui que trust* who did not actually demise, or let the tenant into possession, could not maintain an action for use and occupation, as no tenancy would be *implied* under a party who has not the legal estate. Thus, where A. was seised in trust for B. and C., it was held the

(*x*) *Per* Lord Ellenborough in Dean and C. of Rochester *v.* Pierce, 1 Camp. 466; see, too, as to other actions on implied contracts, Mayor, &c., of Stafford *v.* Till, 4 Bing. 75; Beverley *v.* Lincoln Gaslight and Coke Co., 6 A. & E. 838, 839; Mayor, &c., of Thetford *v.* Tyler, 8 Q. B. 85; Doe *d.* Birmingham Canal Co. *v.* Bold, 11 Q. B. 128; Drury Lane Theatre Co. *v.* Chapman, 1 C. & K. 14.

(*y*) Powell *v.* Hibbert, 15 Q. B. 129.

(*z*) Harding *v.* Hall, 10 M. & W. 42.

(*a*) Ward *v.* Clarke, 12 M. & W. 747; 1 D. & L. 1027; see also Hardon *v.* Hesketh, 4 H. & N. 175; 28 L. J., Ex. 137.

(*b*) See Doe *d.* Jackson *v.* Hiley, 10 B. & C. 885; explained in Allason *v.* Stark, 2 A. & E. 255; see, too, Cantrell *v.* The Windsor Union, 4 Bing. N. C. 348.

(*c*) Doe *d.* Jackson *v.* Hiley, *supra*.

(*d*) Doe *d.* Bailey *v.* Foster, 3 C. B. 215; *In re* Paddington Charities, 8 Sim. 629. As to the law before the act, see 31, *ante*.

(*e*) Hardon *v.* Hesketh, 4 H. & N. 175.

latter could not maintain an action for use and occupation in their own names, treating A. as their agent (*f*). On the other hand, where the cestui que trust himself demised to the defendant, he and not the trustee was considered the proper party to sue, and it was held that the trustee [*541] *could not make himself landlord merely by giving the tenant notice to pay the rent to him (*g*).

In Howe *v.* Scarrott (*h*), real estates were conveyed by marriage settlement to trustees, in trust to permit the wife to receive the rents to her separate use, independently of her husband. After the marriage the husband let the premises to tenants, speaking of them as property in which his wife was interested. The wife received the rents during her life. It was held, that it was a question of fact in what character the husband let the premises, whether as agent for the trustees or as dealing with his wife's property, and that after the death of the wife the tenants were not estopped from denying that the husband had any interest, *unless it was found that he let in his own name* (*i*).

Now, however, when all equitable interests are recognized, a cestui que trust could sue, but it is not likely that it is a course that will be often followed, as it is specially provided (*k*) that trustees represent their beneficiaries.

If the original lessor be dead, but the tenant has recognized the title of a cestui que trust named in his will, and paid rent to him, the tenant cannot afterwards dispute the title of the cestui que trust, supposing the attornment not to have been procured by any fraud (*l*).

By an auctioneer. — An auctioneer cannot generally maintain an action for the use and occupation of lands let by auction on behalf of the owner, but the action should be brought in the name of the owner (*m*), although if a con-

(*f*) Morgell *v.* Paul, 2 Man. & R. 303; and see Cobb *v.* Carpenter, 2 Camp. 13, n.; Howe *v.* Scarrott, and Sharp *v.* Scarrott, 4 H. & N. 723; Sloper *v.* Saunders, 29 L. J., Ex. 275.

(*g*) Churchward *v.* Ford, 2 H. & N. 446.

(*h*) 4 H. & N. 729.

(*i*) Howe *v.* Scarrott, and Sharp *v.* Scarrott, 4 H. & N. 723.

(*k*) R. S. C. Ord. XVI., Rule 8.

(*l*) Dolby *v.* Iles, 11 A. & E. 335; see, too, Doe *d.* Marlow *v.* Wiggins, 4 Q. B. 367.

(*m*) Evans *v.* Evans, 3 A. & E. 132.

tract of letting be made with him individually, he may sue for the rent as agreed (*n*).

SECT. 3. — *Against whom Action of Use and Occupation maintainable.*

Lessee who has ceased to occupy. — It is to be observed that the words of the statute 11 Geo. 2, c. 19, s. 14, are in the alternative "held *or* occupied" — "held *or* enjoyed" (*o*). This has frequently been specially noticed (*p*). If, therefore, the lessee has once *entered to take possession as tenant*, and the term has commenced, he will be deemed "to hold" during the continuance of the term, and until it be *legally determined* by effluxion of time, notice to quit, surrender, merger or otherwise, whether he continue "to occupy" by himself or his subtenants, or not (*q*). The *principle is, that a *constructive holding or occupation as tenant is sufficient after entry*, without actual occupation or enjoyment (*r*). For example, where a tenant from year to year under a parol demise assigned all his term and interest, but the landlord did not accept such assignee as his tenant: held, that the tenant might be sued for use and occupation (*s*). But it would be a misdirection to tell the jury that a constructive occupation is sufficient, before an actual entry to take possession, and without explaining the meaning of a "constructive occupation" (*t*). [*542]

Lessee who has sublet. — In accordance therefore with this principle of constructive occupation, it has been decided that a lessee who has sublet the demised premises may be sued for use and occupation, for he holds the premises as tenant,

(*n*) Fisher *v.* Marsh, 6 B. & S. 411; 34 L. J., Q. B. 177.

(*o*) *Ante*, 536.

(*p*) Pinero *v.* Judson, 6 Bing. 206, 211; Smith *v.* Twoart, 2 M. & G. 842.

(*q*) See Bessell *v.* Landsberg, 7 Q. B. 638; Cannan *v.* Hartley, 9 C. B. 634; 19 L. J., C. P. 323; Pollock *v.* Stacey, 9 Q. B. 1033.

(*r*) Pinero *v.* Judson, 6 Bing. 206, 211; Smith *v.* Twoart, 2 M. & G. 841; Atkins *v.* Humphrey, 2 C. B. 654; 3 D. & L. 612; Pollock *v.* Stacey, 9 Q. B. 1033; Cannan *v.* Hartley, *supra*.

(*s*) Shine *v.* Dillon, 1 Ir. Com. L. R. 277; 15 W. R. 847.

(*t*) Towne *v.* D'Heinrich, 13 C. B. 892; 22 L. J., C. P. 219.

and occupies them by his subtenant (*u*). In such case the subtenant is not liable to the original lessor (*x*). But if the landlord, with the consent of the tenant, accept of the subtenant, or a new tenant (*y*), as his tenant, and receive rent from him or distrain upon him for rent due from him, he cannot afterwards sue the original tenant for use and occupation (*z*). If the landlord merely consent to accept of the subtenant without exonerating the original tenant, it has been held by Erle, J., that that is not sufficient (*a*).

Lessee who holds over. — A lessee, or his assignee, who holds over[1] after his term or tenancy has expired or been duly determined, is liable for subsequent use and occupation, provided the landlord has acted so as to raise a presumption of a continued tenancy, and not an intention to treat the tenant as a mere trespasser (*b*). But if a party takes premises for a certain time and holds over, he does not thereby necessarily become tenant from year to year, unless something occurs to show the existence of such new contract (*c*). For instance, where a tenancy from year to year has been determined by a regular notice to quit, the mere accidental detention of the key by the tenant (who has quitted the premises and removed his goods) for two days beyond the expiration of the term, does not amount to any evidence of

(*u*) Bull *v.* Sibbs, 8 T. R. 327; see also Waring *v.* King, 8 M. & W. 571; Hyde *v.* Moakes, 5 C. & P. 42.

(*x*) See Holford *v.* Hatch, 1 Doug. 183.

(*y*) Walls *v.* Atcheson, 3 Bing. 462; Hall *v.* Burgess, 5 B. & C. 332.

(*z*) Thomas *v.* Cook, 2 B. & A. 119; and see Harding *v.* Crethorn, 1 Esp. 57.

(*a*) Dawson *v.* Lamb, 3 C. & K. 269.

(*b*) Harding *v.* Crethorn, 1 Esp. 57; Bayley *v.* Bondley, 5 C. B. 396; Bishop *v.* Howard, 2 B. & C. 100; Davis *v.* Morgan, 4 B. & C. 8; Waring *v.* King, 8 M. & W. 571; and see Hellier *v.* Silcox, 19 L. J., Q. B. 295.

(*c*) Waring *v.* King, 8 M. & W. 571.

[1] **Liability of tenant holding over.** — In some states it requires *mutual* assent to continue the tenancy in case of the tenants holding over (as Massachusetts, Maine, New Brunswick, etc.). In others, the tenant holding over is held to be a tenant or a trespasser, at the election of the landlord (New York, etc.). In states where mutual assent is required, a tenant holding over without it is not liable for use and occupation unless (as in Massachusetts), there is a special statute making him liable. In other states he is liable, even without a special statute.

See *ante*, ch. 6, sec. 2, note, "Holding over — different effects."

use and occupation, so as to make him liable for another quarter (*d*). It is a question for the * jury [*543] whether a mere holding over, or the creation of a new tenancy between the parties, was intended (*e*).

Tenant liable for holding over of subtenant. — It is the duty of a tenant on the expiration of his term to deliver up possession of the demised premises to his landlord, free from incumbrances created by the tenant (*f*). Therefore, if any subtenant refuse to quit possession at the end of the term, the tenant will continue liable for use and occupation so long as his subtenant holds over, but no longer (*g*). When premises are let for a certain term to A. and B., and A. holds over after the expiration of the term, with B.'s assent, both are liable in an action for use and occupation so long as A. continues to occupy, but no longer (*h*): but if either of them holds over without the other's assent, the latter will not be liable (*i*). It may be well to call attention to one case, that of Waring *v.* King (*k*), in which the decision was based on the ground that the conduct of the defendants amounted to an exercise of the option (given them by their lease) to continue tenants for a longer period than the original term for which the property was leased. In that case the defendants took certain premises of the plaintiff for nine months, at a certain rent, with the option at the end of that time of taking a lease for seven, fourteen, or twenty-one years; but before the expiration of the nine months the defendants let the premises to a company for six months, who actually occupied them for that period: held, that, at the end of a year from the expiration of the nine months, the defendants were liable to the plaintiff in an action for use and occupation for a year's rent.

Lessee, after an ejectment or eviction, not liable. — By issuing and serving a writ in ejectment, the claimant elects to

(*d*) Gray *v.* Bompas, 11 C. B., N. S. 520; *post*, Chap. XX.

(*e*) *Per* Lord Denman, Jones *v.* Shears, 4 A. & E. 832.

(*f*) *Per* Lord Kenyon, in Harding *v.* Crethorn, 1 Esp. 57, and see *post*, Chap. XX.

(*g*) Ibbs *v.* Richardson, 9 A. & E. 849.

(*h*) Christy *v.* Tancred, 7 M. & W. 127; 9 Id. 438; 12 Id. 316, S. C.

(*i*) Draper *v.* Crofts, 15 M. & W. 166.

(*k*) 8 M. & W. 571.

treat the defendants therein named as trespassers, on and from the day mentioned in the writ: and he cannot sue them as tenants for use and occupation subsequent to that day (*l*). But the rent which became due *before* the day mentioned in the writ of ejectment may be recovered in an action for use and occupation (where the demise was not by deed), notwithstanding the proceedings in ejectment (*m*). The remedy for the occupation, &c., on and subsequent to the day mentioned in the writ, is by an action for mesne profits, &c. (*n*) or for double value under 4 Geo. 2, c. 28 (*o*), but not for double rent under 11 Geo. 2, c. 19, s. 18 (*p*). A lessee who has been turned out of possession by the [*544] landlord is not liable for subsequent use and * occupation (*q*); but where the landlord of apartments forcibly ejected an offensive man left in possession by the tenant, it was held, that it was a question for the jury whether it was done for the purpose of depriving the tenant of his possession, or merely to get rid of the offensive person who had misconducted himself (*r*). A tenant who has been evicted from part of his premises, and who has not exercised his right to give up the residue, remains liable for use and occupation of such residue (*s*). A lessee, against whom a judgment in ejectment has been obtained by a third person, and who has been turned out of possession under a writ of habere facias possessionem, or who, to avoid being so turned out, has attorned and become tenant to the claimant in the ejectment, is not liable to his lessor for use and occupation subsequent to such eviction or attornment, for the occupation is then by permission of the ejector and not of the original lessor (*t*). But with respect to any rent which became due and payable after the day named in the action

(*l*) Birch *v.* Wright, 1 T. R. 378; Jones *v.* Carter, 15 M. & W. 718; Franklin *v.* Carter, 1 C. B. 750; 3 D. & L. 213.

(*m*) Birch *v.* Wright, 1 T. R. 378.

(*n*) Id. 378, 387; and see Rules of the Supreme Court, App. A., Part II., sect 4.

(*o*) Soulsby *v.* Neving, 9 East, 310; *post*, Chap. XX.

(*p*) Soulsby *v.* Neving, *supra*.

(*q*) Prentice *v.* Elliott, 5 M. & W. 606; 7 Dowl. 819; Selby *v.* Browne, 7 Q. B. 620.

(*r*) Henderson *v.* Mears, 1 F. & F. 636; 28 L. J., Q. B. 305.

(*s*) *Per* Lord Ellenborough in Smith *v.* Raleigh, 3 Camp. 514, and *per* Dallas, J., in Stokes *v.* Cooper, id. note.

(*t*) Newport *v.* Hardy, 2 D. & L. 921

of ejectment, before such eviction or attornment, and which has been actually paid, it would seem to be necessary for the defendant to plead specially such facts as will show a payment (*s*).

Substituted tenant. — When a new tenant has been substituted with the mutual consent of all parties, the landlord may sue such new tenant for his subsequent use and occupation (*u*). But unless such substituted tenancy has been created, or there has been an assignment of the lease, the landlord should sue the original tenant, and not another person who has entered into possession during the continuance of the lease (*x*). After paying the rent the original tenant will have a remedy over against his subtenant either for use and occupation or for money paid to his use (*y*).

Assignee of term. — Assignees of a void lease (not duly granted pursuant to a power) who have paid the rent reserved during the term therein expressed to be granted, and have subsequently held over, are liable to an action for use and occupation (*z*).

Executors or administrators. — The legal personal representatives of a deceased tenant are not liable personally as assignees of the term, unless they have entered as such to take possession of the demised premises, the purpose for which they have entered being a question of fact for the jury (*a*); and for all such use and occupation subsequent to the testator's or * intestate's death, they must be charged [*545] personally and not in their representative capacity (*b*).

Further, the case differs from that of assignees, for an entry by one of several executors will not enure as an entry by all of them so as to render them jointly liable *de bonis propriis* in an action for use and occupation (*c*). When an

(*u*) Phipps *v.* Sculthorpe, 1 B. & A. 50; Dawson *v.* Lamb, 3 C. & K. 269. But not the original tenant; Laurance *v.* Faux, 2 F. & F. 435.

(*x*) Hyde *v.* Moakes, 5 C. & P. 42.

(*y*) Dawson *v.* Lamb, 3 C. & K. 269.

(*z*) Beale *v.* Sanders, 3 Bing. N. C. 850.

(*a*) Remnant *v.* Bremridge, 8 Taunt. 191; Kearsley *v.* Oxley, 2 H. & C. 896; see also *ante*, 289.

(*b*) Nixon *v.* Quinn, 2 Ir. Com. L. R. 248.

(*c*) Nation *v.* Tozer, 1 C., M. & R. 172; cited 3 A. & E. 667.

executor who has entered is sued personally for use and occupation, he may show that his occupation was as executor, and that he entered in that character, and that he has no assets, and that the value of the land is not equal to the rent. If the land yields some profit, but less than the rent, he may tender before action such amount of profit, and plead the tender, or he may plead payment of the amount into court (*d*).

Trustee in bankruptcy. — With regard to the liability of a trustee in bankruptcy, and the position of a bankrupt tenant, the question will be found discussed in an earlier chapter (*e*).[1]

Corporations aggregate. — We have seen that corporations aggregate may recover compensation for the use and occupation of their property; they may also be liable for the same as tenants (*f*), where they have actually used and occupied land, for a corporate purpose, by the permission of the owner (*g*).[2] But as they cannot bind themselves by an executory contract, not under their common seal, they will be liable for use and occupation during such period as they actually occupy, and not afterwards under any implied tenancy from year to year (*h*).

Churchwardens and overseers. — Churchwardens and overseers, if in occupation of land not rented for parochial purposes alone (and therefore not protected by 59 Geo. 3, c. 12, s. 12), will be liable personally to pay for the same (*i*).

(*d*) Patten *v.* Reid, 6 L. T. 281, Q. B.

(*e*) *Ante*, 274.

(*f*) Beverley *v.* Lincoln Gaslight and Coke Co., 6 A. & E. 839, 843; and the right seems to have been assumed in Green *v.* London Cemetery Co., 9 C. & P. 6.

(*g*) Lowe *v.* London and North Western R. Co., 18 Q. B. 632; 21 L. J., Q. B. 361; Markham *v.* Stanford, 14 C. B., N. S. 380; Willes, J.

(*h*) Finlay *v.* Bristol and Exeter R. Co., 7 Exch. 409; see, too, Copper Miners Co. *v.* Fox, 16 Q. B. 229.

(*i*) Uthwatt *v.* Elkins, 13 M. & W. 772; and see Furnival *v.* Coombes, 5 M. & G. 736.

[1] See *ante*, ch. 7, sec. 10, notes, and sec. 11 (*b*), notes, "The law as to disclaimer by assignees in bankruptcy in the United States."

[2] See *ante*, ch. 2, sec. 9, note, "Leases to corporations," and ch. 1, notes on corporations. Corporations can, in the United States, ordinarily make executory contracts without using the common seal, unless the character of the contract itself requires a seal.

Intended lessee. — We have seen that a person who has *entered into possession* under a mere agreement for a lease, which has never been granted, is liable to be sued for use and occupation (*k*); therefore, where the defendant in expectation of a lease by indenture, which he had agreed to take from the plaintiff, procured attornments from some of the tenants and received rents from others, it was held, that he was liable for use and occupation (*l*). Where the defendant was let into possession of premises provisionally, with a view to an agreement for occupying them, which he afterwards refused to sign, he was held liable to pay for the period of the occupation (*m*). But where the defendant entered * under an agreement for a future [*546] lease, which it afterwards appeared the plaintiff was unable or unwilling to grant, the defendant was relieved from liability to an action for use and occupation, although he had received some of the rents from the subtenants (*n*).

Intended purchaser. — Where the vendee of an estate sold by auction or otherwise has been suffered to enter upon and hold the premises while the title was under investigation, and the contract has afterwards been determined for want of title, the vendor cannot, on these grounds only, recover for use and occupation, although the jury find that the occupation has been beneficial (*o*): or that he has received rent from the sub-tenants (*p*). But if the vendee retain possession *after the contract for purchase has gone off*, he will be liable for the subsequent use and occupation (*q*).

Vendor remaining in possession. — The fact that the vendor remains in possession of part of the property after the execution of the conveyance, does not thereby make him a tenant to the purchaser (even at sufferance), nor in any way liable to him in action for use and occupation. The purchaser's

(*k*) Smith *v.* Eldridge, 15 C. B. 236; Dawes *v.* Dowling, 31 L. T. 65.

(*l*) Neale *v.* Swind, 2 C. & J. 377.

(*m*) Coggan *v.* Warwicker, 3 C. & K. 40.

(*n*) Rumball *v.* Wright, 1 C. & P. 589.

(*o*) Winterbottom *v.* Ingham, 7 Q. B. 611; Kirtland *v.* Pounsett, 2 Taunt. 146; Hearne *v.* Tomlin, Peake, N. P. C. 192, 253; Corringan *v.* Woods, 1 Ir. Com. L. R. 73; 15 W. R. 318.

(*p*) Rumball *v.* Wright, 1 C. & P. 589.

(*q*) Howard *v.* Shaw, 8 M. & W. 118.

remedy in such a case is by an action to recover possession of the land and mesne profits (*r*).

SECT. 4. — *For what Kind of Property the Action is maintainable.*

Use and occupation of incorporeal property. — This right to recover compensation for use and occupation is not confined to land and houses, or the like, but will extend to any hereditament, corporeal or incorporeal: such, for example, as a fishery (*s*); a right of fishing with rod and line (*t*); a right of shooting (*u*); and of hunting (*x*); a mine with liberty to dig (*y*); a coal pit (*z*); a water-course and weir (*a*); a way (*b*); tithes; a pew; seats in a Jewish synagogue (*c*); a seat in a house to view a procession; the saloon of a theatre with a right to supply refreshments (*d*); and furnished or unfurnished lodgings (*e*).

[*547] *SECT. 5. — *Writ and Pleadings.*

Form of indorsement of writ. — Much of the learning with regard to actions for use and occupation, which under the former system of pleading was of great importance, has become obsolete since the Judicature Acts have come into force. The old form of words is to some extent still preserved in the indorsement of writs; the schedule to the Rules of the Supreme Court (*f*) giving the form, "the plaintiff's claim is £ for the use and occupation of a house." There is also a form given (*f*), "the plaintiff's claim is for £ for arrears of rent"; and the former will be the more

(*r*) Tew *v.* Jones, 13 M. & W. 12.

(*s*) See 15 & 16 Vict. c. 76, Schedule (B), Form 10.

(*t*) Holford *v.* Pritchard, 3 Exch. 793.

(*u*) Thomas *v.* Fredericks, 10 Q. B. 775.

(*x*) Bird *v.* Higginson, 2 A. & E. 696; 6 A. & E. 824.

(*y*) Jones *v.* Reynolds, 4 A & E. 805; 7 C. & P. 335.

(*z*) Lees *v.* Wright, 1 D. & R. 391.

(*a*) Davis *v.* Morgan, 4 B. & C. 8.

(*b*) 2 Chit. Pl. (7th ed.), 39, 40, 41.

(*c*) Israel *v.* Simmons, 2 Stark. 356.

(*d*) Drury Lane Theatre Co. *v.* Chapman, 1 C. & K. 14.

(*e*) 2 Chit. Pl. 41, 42; Cook *v.* Moylan, 1 Exch. 67; 5 D. & L. 101; Izon *v.* Gorton, 5 Bing. N. C. 501.

(*f*) R. S. C., App. A., Part II., s. 2.

correct indorsement where the money claimed is not strictly rent — *i.e.* is not due under any actual demise: but the writ may be amended by leave at any stage of the proceedings (*g*).

Pleadings. — As far, however, as the pleadings are concerned the law now requires them to be a statement of facts, and therefore the technical forms are no longer of importance, and it is enough if the statement of claim allege facts which show an entry and occupation and a relation of landlord and tenant between the parties.

The defendant will be in the same position as if there had been an actual demise as regards any right to set up that the plaintiff had no title when he the defendant entered, a defence which, as we have seen, is not open to him (*h*), though he may show that it has since come to an end (*i*).

Estoppel. — Thus if the defendant obtained possession of the premises from the plaintiff as tenant thereof to him, he is thereby estopped from disputing the plaintiff's right to dispose of such possession (*k*).[1] The principle is, that the defendant, having had the use, occupation and enjoyment of the premises by the permission of the plaintiff, cannot deny the plaintiff's title to dispose of the possession during the period of such occupation as an answer to the claim for compensation (*l*). If the steward of a person not named says to another, "I let you into possession in the name of the landlord" (not mentioning the name); parol evidence is admissible to show who such landlord is, and the tenant who so obtained possession is estopped from denying such landlord's title (*m*). But in any such cases the defendant may show that after the demise, and before any part of the rent

(*g*) R. S. C., Order XXVII., Rule 11.

(*h*) Lewis *v.* Willis, 1 Wils. 314; Curtis *v.* Spitty, 1 Bing. N. C. 15.

(*i*) Newport *v.* Hardy, 2 D. & L. 921; see, too, Boodle *v.* Campbell, 7 M. & G. 386; Selby *v.* Browne, 7 Q. B. 620; Hartshorne *v.* Watson, 4 Bing. N. C. 178.

(*k*) Fleming *v.* Gooding, 10 Bing. 549; Cooper *v.* Blandy, 1 Bing. N. C. 45; Cooke *v.* Loxley, 5 T. R. 4; Balls *v.* Westwood, 1 Camp. 12.

(*l*) See Agar *v.* Young, Car. & M. 78.

(*m*) Fleming *v.* Gooding, 10 Bing. 549.

[1] See *ante*, ch. 1, note, "Tenancies by estoppel."

claimed became due, the plaintiff assigned his reversion (*n*); or that the plaintiff's title was defeasible, and was [*548] legally defeated after the demise and before *the rent claimed became due (*o*). If the defendant obtained possession from A. B. as his tenant, and the plaintiff derives his title from A. B., the defendant is estopped from disputing the right of A. B. to dispose of such possession (*p*), and also from disputing A. B.'s right to assign the reversion (*q*); but the assignment itself may be disputed (*r*). If the defendant has expressly attorned to the plaintiff, he will thereby be estopped from disputing the plaintiff's title, unless such attornment be proved to have been obtained by fraud, or through some mistake of facts (*s*). Where a tenant was let into possession by A. and paid him rent, and afterwards A. agreed to grant a lease to B., who then received one quarter's rent from the tenant, but afterwards the agreement between A. and B. was rescinded: it was held that, in an action by B. for use and occupation for the next quarter's rent, the tenant was not estopped from showing these facts, whereby the parties were remitted to their original rights (*t*).

The statute of limitations.— It is a good defence to plead the Statute of Limitations where the defendant was formerly tenant from year to year, and quitted without due notice, but has not, within six years before the action, occupied the premises, or paid any rent, or done any act from which a tenancy can be inferred (*u*). It is also a good defence as to any rent which became due and payable more than six years before the commencement of the action. The defendant may also show that the plaintiff's title to the reversion has

(*n*) Harmer *v.* Bean, 3 C. & K. 307.

(*o*) Mountney *v.* Collier, 1 E. & B. 630; 22 L. J., Q. B. 124; Powell *v.* Hibbert, 15 Q. B. 129; 19 L. J., Q. B. 347.

(*p*) Palmer *v.* Ekins, 2 Ld. Raym. 1550; 2 Stra. 817; Parker *v.* Manning, 7 T. R. 537; Bringloe *v.* Goodson, 4 Bing. N. C. 726.

(*q*) Rennie *v.* Robinson, 1 Bing. 147; Parker *v.* Manning, 7 T. R. 537; Sturgeon *v.* Wingfield, 15 M. & W. 224; Doe *d.* Marriott *v.* Edwards, 5 B. & Adol. 1065.

(*r*) Phillips *v.* Pearce, 5 B. & C. 433.

(*s*) Phipps *v.* Sculthorpe, 1 B. & A. 50; Doe *d.* Marlow *v.* Wiggins, 4 Q. B. 367; *ante*.

(*t*) Brook *v.* Briggs, 2 Bing. N. C. 572.

(*u*) Leigh *v.* Thornton, 1 B. & A. 625.

been barred and extinguished under 3 & 4 Will. 4, c. 27 (*x*). But so long as the relation of landlord and tenant subsists, the right of the landlord to rent is not barred by nonpayment, except that under sect. 42 the amount to be recovered is limited to six years (*y*).

Sect. 6. — *Evidence.*

Relation of landlord and tenant. — We have seen that to entitle a plaintiff to recover compensation for the use and occupation of his property it must appear that there was a relation of landlord and tenant between the parties;[1] there may, however, be various modes in which this may be proved for the purposes of an action; an admission of the tenancy by the defendant, by submission to a distress, advertisement of himself as tenant or * otherwise is primâ [*549] facie evidence against him (*z*), but may be rebutted by sufficient evidence to the contrary (*a*).

Occupation and payment of rent. — Evidence that the defendant has actually occupied the premises, and has on one or more occasions paid rent to the plaintiff in respect thereof, will be primâ facie sufficient (*b*). Indeed, payment of rent is a sufficient recognition of the landlord's title to support an action for use and occupation, although it appear upon the evidence on the part of the plaintiff that the defendant originally came in under another person, or that the plaintiff has only an equitable estate (*c*). In one case the defendant and his predecessors in estate had paid to the plaintiffs and their predecessors, overseers of the poor of the township of S., an

(*x*) Fursden *v.* Clogg, 10 M. & W. 572.

(*y*) Archbold *v.* Scully, 9 H. L. Cas. 360; 7 Jur. N. S. 1169.

(*z*) Panton *v.* Jones, 3 Camp. 372; Cooper *v.* Blandy, 1 Bing. N. C. 45; Sullivan *v.* Jones, 3 C. & P. 579; Hill *v.* Ramm, 5 M. & G. 789.

(*a*) Cox *v.* Knight, 18 C. B. 645; 25 L. J., C. P. 314.

(*b*) Ros. Ev. 162, 163 (11th ed.).

(*c*) Dolby *v.* Iles, 11 A. & E. 335.

[1] See *ante*, sec. 1, note, "Actions for use and occupation."

annual sum of 6*l.* 14*s.* 8*d.*, expressed to be for rent for common lands, and it was admitted that the defendant was in possession of the lands out of which the rent issued, but they were not identified, and there was no evidence given of their extent or value, and the defendant would not produce his deeds pursuant to notice: it was, however, held, that there was evidence on which a jury might find that a relation existed between the parties such as to entitle the plaintiffs to recover for use and occupation (*d*).

Judgment in previous action. — A judgment in a previous action for use and occupation between the same parties is primâ facie evidence that the defendant occupied by the sufferance of the plaintiff: but it is not conclusive, and the jury ought to take into their consideration all the circumstances under which that judgment was obtained (*e*). The correctness or validity of such judgment can be questioned only in a court of appeal (*f*): and parol evidence will probably always be admissible to show in respect of what premises, and for what rent such judgment was recovered (*g*). But a previous judgment against two persons is no evidence in another action against one of them only for subsequent use and occupation (*h*).

Notice to quit given by defendant. — A notice to quit given by the defendant is admissible evidence that the defendant held the premises therein mentioned as tenant thereof to plaintiff (*i*).

Evidence of entry as tenant. — We have also seen [*550] that there must be an *entry* as tenant; for * example, if a party to whom a mining lease is granted enter and dig holes merely to ascertain what sort of a bargain he has made, or is about to make, and has them filled up again

(*d*) Hardon *v.* Hesketh, 4 H. & N. 175; 28 L. J., Ex. 137; compare this case with Att.-Gen. *v.* Stephens, 6 De Gex, M. & G. 111; 25 L. J., Ch. 888.

(*e*) *Per* Coleridge, J., Jones *v.* Reynolds, 7 C. & P. 335.

(*f*) 9 C. B. 333; Dick *v.* Tolhausen, 4 H. & N. 695.

(*g*) See, as to the right to reopen a verdict, Hitchen *v.* Campbell, 2 W. Blac. 827; 3 Wils. 304; Seddon *v.* Tutop, 6 T. R. 607; Preston *v.* Peeke, E., B. & E. 336; 28 L. J., Q. B. 424, 427.

(*h*) Christy *v.* Tancred, 9 M. & W. 438; 12 M. & W. 316.

(*i*) Marston *v.* Dean, 7 C. & P. 13.

immediately, that does not amount to an entry *to take possession as tenant* (*k*). But where a party who had agreed to rent a house sent in a woman to clean it, and workmen to paper one of the rooms, that was held sufficient evidence to go to the jury of a taking possession as tenant (*l*). So where, after an agreement for a lease, the intended lessee entered and put up a board stating "this house to let, inquire, &c.:" this was held to be sufficient evidence to go to the jury of a taking possession as tenant (*m*).

If the landlord prove that a tenancy commenced and entry was had, the burden is then on the defendant to show that it has been determined before the time for which compensation is claimed (*n*).

Surrender. — The defendant may prove a surrender[1] of his term to the plaintiff before any of the rent claimed became due; such surrender may be by deed (*o*), or by the acceptance of a new lease (*p*), or by other act and operation of law (*p*). If a landlord during a current quarter accept from his tenant the key of the house demised, under a parol agreement that upon the tenant then giving up possession the rent shall cease, and the landlord occupies the premises from that time, he cannot recover for any use and occupation subsequent to his accepting the key (*q*).

Notice to quit, &c. — The defendant may prove that he gave due notice to quit and quitted accordingly before the commencement of the period in respect whereof the rent is claimed (*r*). Whether the notice to quit was sufficient and served in due time is sometimes the real question to be de-

(*k*) Jones *v.* Reynolds, 7 C. & P. 335.

(*l*) Smith *v.* Twoart, 2 M. & G. 841.

(*m*) Sullivan *v.* Jones, 3 C. & P. 579.

(*n*) Ward *v.* Mason, 9 Price, 291.

(*o*) *Ante*, 296.

(*p*) *Ante*, 299.

(*q*) Whitehead *v.* Clifford, 5 Taunt. 518; Grimman *v.* Legge, 8 B. & C. 324; Furnivall *v.* Grove, 8 C. B., N. S. 496; 30 L. J., C. P. 3.

(*r*) Bird *v.* Defonville, 2 C. & K. 415.

[1] See *ante*, ch. 8, sec. 3 (*b*), notes, "Surrender by operation of law," and "Surrender by acceptance of new lease."

"Justifiable abandonment," which perhaps may come more properly under the head of eviction, is treated in first-named note, as well as substitution of new tenant, delivery of key and other topics.

cided in this form of action (*s*). Such notice is sufficient if given to the plaintiff's authorized agent, or sent to him by post in due time (*t*). Where a tenant from year to year, at a rent payable half-yearly, quitted at the end of a current year without giving notice, and the landlord before the end of the next half-year relet the premises to another tenant: held, that such reletting amounted to an eviction of the first tenant, and that the landlord could not maintain use and occupation against him for any rent subsequent to the period when he quitted (*u*). But the entry by the landlord must be for the purpose of a profitable occupation, and [*551] therefore * if he enters and puts a bill in the window for the purpose of reletting the premises, but not to retake possession, that will not be sufficient to prevent him recovering subsequent rent from a tenant who quitted without notice (*x*).

Sect. 7. — *What Amount can be recovered.*

What can be recovered. — As the presumption, when a landlord proceeds to recover compensation of this kind, is, that no specific rent has been agreed on, he may recover in this form of action a reasonable satisfaction for the use and occupation of the lands, tenements or hereditaments held or occupied by the defendant as his tenant, or by his permission or sufferance (*y*). No inquiry is made as to the profit resulting from the cultivation, or as to the property being cultivated at all (*z*). He who holds another's premises with his permission, but without an express bargain as to the rent, agrees to pay what a jury may find the occupation to be worth. This is a principle resulting from the nature of an action for "use and occupation" (*a*). Such "reasonable

(*s*) Bessell *v.* Landsberg, 7 Q. B. 638; Papillon *v.* Brunton, 5 H. & N. 518.

(*t*) Papillon *v.* Brunton, *supra*.

(*u*) Hall *v.* Burgess, 5 B. & C. 332.

(*x*) Redpath *v.* Roberts, 3 Esp. 225, Kenyon, C. J.; Bird *v.* Defonville, 2 C. & K. 415, Erle, J.

(*y*) 11 Geo. 2, c. 19, s. 14; Tomlinson *v.* Day, 2 Brod. & B. 680; 1 Arch. N. P. 98.

(*z*) 1 Man. & Gr. 312, n. (*a*).

(*a*) Mayor of Thetford *v.* Tyler, 8 Q. B. 100; 15 L. J., Q. B. 33.

satisfaction" accrues, like interest, *de die in diem* according to the time of the actual occupation (*b*).

Where a specific rent agreed on. — Where it turns out that a specific rent has been agreed on, payable quarterly, half-yearly or yearly, such rent is the proper measure of damages; and the lease (if not under seal) or the written agreement, if duly stamped, may, as we have seen, by 11 Geo. 2, c. 119, s. 4, be used as evidence of the *quantum* of damages to be recovered (*c*), and of the time at which such rent became payable. It makes no difference in this respect that the agreement is void as to the duration of the term therein mentioned, either by the Statute of Frauds or the 8 & 9 Vict. c. 106, s. 3 (*d*); nor that the defendant was and is a lunatic (*e*).

After an eviction from part. — But if the defendant has not had the use and occupation of *all* the premises agreed to be demised,[1] or if there had been an eviction from part, by reason of a defect in the plaintiff's title, the jury may ascertain the value of the occupation of the land actually enjoyed, without regarding the amount of rent reserved by the * agreement (*f*). [*552]

When condition precedent has not been performed. — So where the plaintiff has not performed a *condition precedent* on his part, ex. gr. to do certain repairs (*g*), to furnish the house or apartments in a specified manner (*h*), or the like, the jury may find how much the actual occupation by the defendant, in the then state and condition of the premises, was reasonably worth.[2] The landlord in such case could not recover or distrain *for the agreed rent* (*i*).

(*b*) Slack *v.* Sharpe, 8 A. & E. 373; Kirkman *v.* Jervis, 7 Dowl. 678; Packer *v.* Gibbins, 1 Q. B. 421.

(*c*) *Ante*, 535.

(*d*) De Medina *v.* Polson, Holt N. P. C. 47; Collett *v.* Curling, 10 Q. B. 785; 5 D. & L. 605; Viscount Downe *v.* Thompson, 9 Q. B. 1044.

(*e*) Dane *v.* Viscountess Kirkwall, 8 C. & P. 675.

(*f*) Tomlinson *v.* Day, 2 Brod. & B. 680.

(*g*) Smith *v.* Eldridge, 15 C. B. 236; Smith *v.* Twoart, 2 M. & G. 841.

(*h*) Mechelen *v.* Wallace, 6 N. & M. 316; 7 A. & E. 54, n.

(*i*) Mechelen *v.* Wallace, *supra*.

(1) As to the effect of total or partial eviction, either by lessor or stranger, see *ante*, ch. 10, sec. 6, "Eviction of lessee."

(2) See *ante*, ch. 13, sec. 1, note, "Defences in suits for rent."

If there be an agreement to pay rent on a definite day, and the relation of landlord and tenant ceases before the day fixed, to entitle the plaintiff to recover a proportionate part of the broken period it must be found that a new tenancy has been created (*k*).

Agreement to pay rent pro ratâ. — If, however, it be mutually agreed to put an end to a tenancy during a current quarter, the tenant to pay pro ratâ at that time, and the landlord accordingly retakes possession, the amount so agreed to be paid may be recovered in an action for use and occupation (*l*). So where the tenant holds over for a week after such an agreement has been come to, and then quits possession, and the landlord then accepts possession, the rent to the end of the week may be recovered, together with any previous arrears of rent pro ratâ (*m*): but the landlord cannot recover as for any subsequent use and occupation (*n*).

Where the tenant has ceased to occupy. — If the term or tenancy as agreed on has commenced (the tenant having entered), the lessee or tenant will be liable to all the rent as agreed, notwithstanding he has ceased to occupy (*o*): unless indeed something has since happened to put an end to the term or tenancy, ex. gr. a surrender by deed or by act and operation of law (*p*).

After a fire. — It is clear upon the authorities, that even if the premises be destroyed by fire, the whole rent will, if a rent has been agreed on, be payable; unless indeed it has also been agreed that if a fire destroy the premises the rent shall cease (*q*), in which case a proportionate part may be recovered for the time the premises are actually in use (*r*). If, however, there is no contract for rent, and the landlord is left to recover compensation for use and occupation, he is (as we have seen (*r*)) only entitled to such sum as a jury

(*k*) Grimman *v.* Legge, 8 B. & C. 324.

(*l*) Thomas *v.* Williams, 1 A. & E. 478.

(*m*) Kirkman *v.* Jervis, 7 Dowl. 678.

(*n*) Whitehead *v.* Clifford, 5 Taunt. 518.

(*o*) *Ante*, Sect. 3.

(*p*) Whitehead *v.* Clifford, *supra*; Grimman *v.* Legge, 8 B. & C. 324; Hall *v.* Burgess, 5 B. & C. 332; Ward *v.* Mason, 9 Price, 291.

(*q*) Baker *v.* Holtzapffell, 4 Taunt. 45; Izon *v.* Gorton, 5 Bing. N. C. 501.

(*r*) *Ante*, 410.

shall find to be a reasonable compensation, and the loss of the buildings by fire might, it is presumed, be taken into consideration by the jury in fixing the sum to be paid; and the same principles will apply if a part only be destroyed by fire (*s*).

*** When premises are held over.** — Where a tenancy [*553] is continued beyond the time for which the premises were originally taken, and nothing is arranged respecting the amount to be paid on the new holding, that new holding is not of necessity to be on the same terms as the former, but the jury may give the landlord a larger sum for the continued occupation, if there be circumstances to show that such increased rent was expected by him in the event of the tenant holding over, and that such expectation was known to and not repudiated by the tenant (*t*). For instance, where a yearly tenant at 47*l.* per annum continued in possession after the determination of his tenancy and during negotiations for a new lease at 80*l.* per annum, which ultimately went off, it was held, that it was a question for the jury what rent was fairly payable for the continued holding (*u*). In such a case the landlord should not *distrain*, but may maintain an action for use and occupation (*x*).

No reduction by reason of acts of third persons. — The defendant will not be entitled to any reduction of rent in respect of acts done by a third person which reduced the value of his occupation, but which were done without the authority of the plaintiff (*y*): as where the demised premises are "injuriously affected" (but no part thereof *taken*) by a railway or other company pursuant to their special act or any act incorporated therein (*z*).

Effect of judgment by default. — Prior to the Judicature Act, where the defendant suffered judgment by default in

(*s*) Bennett *v.* Ireland, E., B. & E. 326; 28 L. J., Q. B. 48.

(*t*) Elgar *v.* Watson, Car. & M. 494.

(*u*) Mayor, &c., of Thetford *v.* Tyler, 8 Q. B. 95.

(*x*) Alford *v.* Vicary, Car. & M. 280; Jenner *v.* Clegg, 1 Moo. & R. 213.

(*y*) Drury Lane Theatre Co. *v.* Chapman, 1 C. & K. 14.

(*z*) As to the compensation recoverable by the tenant from the company in such case, see Lands Clauses Consolidation Act, 1845 (8 Vict. c. 18), ss. 119—121.

an action for use and occupation, a writ of inquiry appears to have been necessary (*a*). And as, if the action is strictly one for use and occupation, it is properly for such a sum as shall be found to be a reasonable compensation, a writ of inquiry or other mode of trial would seem to be still necessary (*b*).

(*a*) Arden *v.* Connell, 5 B. & A. 885; Coote L. & T. 504.

(*b*) R. S. C., Ord. XIII., Rule 6; Ord. XXIX., Rule 4. By the former of these rules, "where the defendant fails to appear to the writ of summons, and the plaintiff's claim is not for a debt or liquidated damages only, but for detention of goods, and pecuniary damages, or either of them, no statement of claim need be delivered, but interlocutory judgment may be entered, and a writ of inquiry shall issue to assess the value of the goods and the damages, or the damages only, as the case may be, in respect of the causes of action disclosed by the indorsement on the writ of summons." The rule proceeds to provide that the damages may by order be ascertained "in any way in which any question arising in an action may be tried." Order XXIX., Rule 4, provides a similar process in case of default of pleading.

*CHAPTER XV.

RATES, TAXES, AND ASSESSMENTS.

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SECT. 1. — *Contracts as to Rates, Taxes, &c.*

Ordinary rule. — The ordinary rule is, that rates and taxes fall upon the tenant, in the absence of express agreement.[1]

Express agreement. — In addition to this, the ordinary agreement is that the tenant pay all rates, taxes and assessments. Sometimes, however, they are thrown partly upon the landlord and partly upon the tenant, the agreement being construed according to the real intention of the parties (*a*). Such stipulations are seldom interfered with by the

(*a*) See Graham *v.* Wade, 16 East, 29; Watson *v.* Atkins, 3 B. & A. 647.

(1) *Taxes*, unless stipulated to be payable by lessee are (as between lessor and lessee) payable by the lessor (Outram *v.* Taylor, 3 Russ. & Geld. (N. S.) 158, 159, 160; Bettison *v.* Budd, 17 Ark. 546). "As a general rule, the tenant is liable in the first instance" (1 Taylor's Land & Ten. (8th ed.), sec. 395), and can pay the taxes, and then deduct them from his rent (Carson *v.* Veitch, 9 Ont. 706 (see Rev. Sts. Ont. ch. 180); Outram *v.* Taylor, 3 Russ. & Geld. (N. S.) 158; Wood's Land & Ten. sec. 417; Cooley on Taxation (2d ed.), pp. 399, 400).

This of course does not apply to a life tenant who is bound to keep down all charges.

It is said that in *Maryland*, if there is no special provision in the lease, the tenant is bound to pay the taxes, and cannot offset them to rent. 1 Taylor's Land & Ten. sec. 395, note, citing Hughes *v.* Young, 5 Gill & J. (Md.) 67. See as to taxes also, Hunt *v.* Amidon, 4 Hill (N. Y.) 349; and Garner *v.* Hannah, 6 Duer (N. Y.) 262.

legislature, which usually provides that "nothing in this act contained shall be construed to alter, change, determine, or make void any contracts, covenants or agreements whatsoever between landlord and tenant, or any other persons, touching the payment of taxes and assessments," or to that effect (*b*).

Exceptions. — But the property tax always formed an exception to the general rule (*c*); and more than one recent statute has either imposed a burden wholly on the landlord, or shared it between the landlord and the tenant (*d*). Generally where a tenant covenants to pay a rent without deducting taxes, a subsequent statute authorizing tenants [*555] to deduct will not repeal the covenant. It does * not *compel* the tenant to make such deduction, and therefore leaves the covenant in full force (*e*). So a tenant may covenant to pay all rates, &c., including those which, under a previous local act, he would have been entitled to deduct from his rent (*f*). But the Property Tax Act makes all such contracts, covenants, and agreements "utterly void" (*g*), so far only as they relate to the property or income tax (*h*).

Land tax and sewers rates. — The land tax usually falls upon the landlord in the absence of an express covenant or stipulation to the contrary (*i*). So do sewers rates, except perhaps those made for ordinary annual expenses (*k*). But

(*b*) 38 Geo. 3, c. 5, s. 35 (Land Tax); 18 & 19 Vict. c. 120, s. 219 (Metropolis Management Act); 25 & 26 Vict. c. 102, ss. 96, 97 (Amendment of the Metropolis Management Acts); 38 & 39 Vict. c. 55, s. 226 (The Public Health Act, 1875).

(*c*) 5 & 6 Vict. c. 35, ss. 60, 103; *post*, Sect. 2 of this chapter.

(*d*) See 32 & 33 Vict. c. 41, as to rating to poor rates any rateable hereditament let for three months or less (*post*, Appendix (A), Sect. 11, where the act is set out *verbatim*); and the Rating Act, 1874, *post*, sect. 15. The Contagious Diseases (Animals) Act, 1869 (32 & 33 Vict. c. 70), s. 89, was to a like effect; but that act has been repealed, and the act of 1878 which replaces it contains no such provision.

(*e*) Brewster *v.* Kitchen, 1 Ld. Raym. 320, 321; Carthew, 438, 439; 12 Mod. 169; Holt. R. 175, 669.

(*f*) Payne *v.* Burridge, 12 M. & W. 727; Thompson *v.* Lapworth, L. R., 3 C. P. 149; 37 L. J., C. P. 74.

(*g*) 5 & 6 Vict. c. 35, s. 103.

(*h*) Fuller *v.* Abbott, 4 Taunt. 105; Tinckler *v.* Prentice, 4 Taunt. 549; Howe *v.* Synge, 15 East, 440; Festing *v.* Taylor, 3 B. & S. 217, 231. See 536, *post*.

(*i*) *Post*, Sect. 3.

(*k*) *Post*, Sect. 4; Callis on Sewers. 140.

the tenant may expressly take upon himself the payment of land tax and sewers rates (*l*); and a general covenant or promise to pay all rates, taxes, &c., will include the land tax and sewers rates (*m*).

Tithe rent-charge. — Under an agreement for a lease at a yearly rent of 40*l.* payable quarterly "free of all outgoings," the tenant ought to pay the land tax and commutation rent-charge; and the landlord is entitled to have a covenant to that effect inserted in the lease (*n*). The tithe rent-charge must be paid under a covenant to pay "any taxes, rates, assessments or charges whatsoever" (*o*), but not, if the words be only "all taxes and assessments" (*p*).

Generally. — Where a contract for an assignment of the lease of a public house described the public house as held at a certain "*net*" *annual rent under usual and common covenants*, it was held, that these words included a covenant by the tenant to pay land tax and sewers rates (*q*). A covenant in a sublease to perform all the covenants in the original lease (except to pay rent and insure) will in effect comprise a covenant, contained in the lease, to pay all rates and taxes whatsoever; and may render the sublessee liable to rates for extraordinary drainage and other works of a permanent nature (*r*).

Construction of covenants to pay rates, &c. — A covenant by a lessee to pay taxes generally, includes parliamentary taxes, and consequently the land tax; for when "taxes" are generally spoken of, if the subject-matter will bear it, parliamentary taxes given to the crown are * included. [*556] If, therefore, a lease be made for years, rendering rent "free and clear from all manner of taxes, charges and

(*l*) Southall *v.* Leadbetter, 3 T. R. 458; Bennett *v.* Womack, 7 B. & C. 627; 3 C. & P. 96; Waller *v.* Andrews, 3 M. & W. 315; Payne *v.* Burridge, 12 M. & W. 730.

(*m*) Amfield *v.* White, Ry. & Moo. 246; Manning *v.* Lunn, 2 C. & K. 13.

(*n*) Parish *v.* Sleeman, 1 De G., F. & J. 326; 29 L. J., Ch. 96. See Form of Covenant, *post*, Appendix B., Sect. 15; and see further, *post*, Sect. 16, "Tithe Rent-charge."

(*o*) Lockwood *v.* Wilson, 43 L. J., C. P. 179; 30 L. T. 761.

(*p*) Jeffery *v.* Neale, L. R., 6 C. P. 240; 40 L. J., C. P. 191.

(*q*) Bennett *v.* Womack, 7 B. & C. 627; 3 C. & P. 96.

(*r*) Sweet, app., Seager, resp., 2 C. B., N. S. 119; Thompson *v.* Lapworth, L. R., 3 C. P. 149; 37 L. J., C. P. 74.

impositions whatsoever," the lessee is bound to pay the whole rent without any manner of deduction for any old or new tax, charge or imposition whatsoever: thus on a grant of a fee-farm rent, "without any deduction, defalcation or abatement for or in any respect whatsoever," the grantee was held to be entitled to receive the full rent without deducting the land tax (*s*). Where a tenant verbally agreed "to pay all taxes," it was held, that under this agreement he was bound to pay the land tax, although it was not specifically mentioned (*t*).

Parliamentary and parochial taxes. — An agreement that "all taxes, parochial and parliamentary," shall be paid by the tenant, will not comprise a sewers rate, for that is neither parochial nor parliamentary (*u*): so an improvement rate made by commissioners under a local act is not parochial or parliamentary (*x*): but the land tax is a parliamentary tax, being imposed directly by parliament (*y*). A covenant by the lessee to pay all parliamentary taxes, assessments, &c., will extend to the land tax which has been redeemed or purchased by a former lessee, and is payable to him under the Land Tax Act (*z*). A country rate is not a parliamentary tax, but it is a parochial rate, because levied and paid with and out of the poor's rate (*a*). By certain acts of parliament provision was made for making rates on certain lands which were before liable ratione tenuræ to repair a bridge, for raising a fund for such repairs; a lessee of part of those lands covenanted to pay his rent free and clear of and from

(*s*) Bradbury *v.* Wright, 2 Doug. 624; Count of Arran *v.* Crisp, 12 Mod. 54; Hopwood *v.* Barefoot, 11 Mod. 237; Bac. Abr. tit. Covenant (F.); Giles *v.* Hooper, Carth. 135; Davenant *v.* Bp. of Salisbury, 1 Vent. 223.

(*t*) Amfield *v.* White, Ry. & Moo. 246; Manning *v.* Lunn, 2 C. & K. 13; Brewster *v.* Kitchin, 1 Ld. Raym. 317; 1 Salk. 198; 12 Mod. 166; Carth. 438; Giles *v.* Hooper, Carth. 135; Champernon *v.* Champernon, cited in Bradbury *v.* Wright, 2 Doug. 624; Blandford *v.* Marlborough, 2 Atk. 542.

(*u*) Palmer *v.* Earith, 14 M. & W. 428.

(*x*) Guardians of Bedford Union *v.* Bedford Improvement Commrs., 7 Exch. 777; but general words may include it so as to render the tenant liable; Payne *v.* Burridge, 12 M. & W. 727; Sweet, app., Seager, resp., 2 C. B., N. S. 119.

(*y*) Manning *v.* Lunn, 2 C. & K. 13.

(*z*) Governors of Christ's Hospital *v.* Harrild, 2 M. & G. 707.

(*a*) Reg. *v.* Inhabts. of Aylesbury, 9 Q. B. 261.

any land tax and all other taxes and deductions whatsoever, either parliamentary or parochial, imposed upon the premises or upon the lessor; it was held that the rate for the repair of the bridge was not a parliamentary tax within this covenant (*b*). Where a local act imposed upon owners the duty of paving, &c., and, in case of their default authorized the commissioners to do the work themselves, and to charge the owners with the expenses proportionally, and to levy the amount by distress on the premises: held, that the sum paid by an owner was for his *breach of duty*, and not for a rate or tax which the tenant was liable to repay (*c*).

* **Party-walls.** — A covenant by the tenant to pay [*557] the land tax, and all other taxes, rates, assessments and impositions whatever, will not oblige him to pay contribution towards the rebuilding of a party-wall (*d*). But where a tenant covenanted to pay "all taxes, rates, duties, assessments and impositions," "it being the true intent and meaning of these presents, that the lessor should have the said yearly rent of 60*l.* hereby reserved, in net money, without any deduction, defalcation or allowance out of the same, on any account whatsoever," and there was also a special covenant as to repairing party-walls, it was held, he could not compel his lessor to contribute to the expense of rebuilding a party-wall (*e*).

New taxes. — A covenant to discharge from taxes extends to subsequent taxes of the same nature as those in being at the time the covenant was made, but not to those of a different nature (*f*). Where a lessee covenanted that he would pay all taxes, charges, rates, tithes or rent-charge in lieu of tithe, dues and duties whatsoever as then were or should at any time thereafter during that demise be taxed, charged, assessed or imposed *upon the said demised* premises; it was held, that the covenant was not confined to rates payable by

(*b*) Baker *v.* Greenhill, 3 Q. B. 148.

(*c*) Tidswell *v.* Whitworth, L. R., 2 C. P. 326; 36 L. J., C. P. 103. Compare this case with Thompson *v.* Lapworth, L. R., 3 C. P. 149; 37 L. J., C. P. 74; and see Bird *v.* Elwes, L. R., 3 Ex. 225; 37 L. J., Ex. 91.

(*d*) Southall *v.* Leadbetter, 3 T. R. 458; Beardmore *v.* Fox, 8 T. R. 214.

(*e*) Barrett *v.* Duke of Bedford, 8 T. R. 603.

(*f*) Brewster *v.* Kitchell, 1 Salk. 198; 1 Ld. Raym. 317; Carthew, 438; 12 Mod. 166; Holt R. 175, 669.

the landlord, but meant all rates then imposed on the lessee in respect of his occupation, and all future rates which might be imposed on the land itself (*g*). Where a person took a part of certain premises, the whole of which were rated at a certain annual value, and the lessor covenanted to pay all taxes then chargeable thereon, and the lessee covenanted to pay all fresh taxes which might thereafter be charged on the premises, or any part thereof: it was held, that the true construction of these covenants was, that the lessor should pay such taxes as were charged on the premises at the time of making the lease, at the then annual value, and that the lessee should pay all fresh taxes, and all such additions to those formerly chargeable as were occasioned by the improved value of the premises (*h*).

Extraordinary assessments. — A tenant of marsh lands, who agreed to pay all outgoings whatsoever, rates, taxes, scots, whether parochial or parliamentary, that then were or should thereafter be chargeable upon the lands, the present land tax excepted, is liable to pay an extraordinary assessment made by the commissioners of sewers for a work of permanent benefit to the land (*i*). A covenant by the tenant to pay all taxes, rates, duties, levies, assessments and payments will [*558] extend to the cost for paving * footways, which, by a local act passed before the lease was made, were made payable by the tenants of the adjoining houses, and which they were allowed to deduct from their rents, in the absence of any express stipulation to the contrary (*k*). A covenant by a lessor to pay all taxes on the demised premises has been held not to extend to the removal of a nuisance caused by an accumulation of mud in ornamental water, which the tenant ought to have cleared out, and which was removed under the Nuisances Removal Act, 1855 (*l*), but a covenant to "bear, pay and discharge" the sewers rate, "and all other taxes,

(*g*) Hurst *v.* Hurst, 4 Exch. 571.

(*h*) Watson *v.* Atkins, 3 B. & A. 647; Graham *v.* Wade, 16 East, 29.

(*i*) Waller *v.* Andrews, 3 M. & W. 315; Palmer *v.* Earith, 14 M. & W. 431; Sweet, app., Seager, resp., 2 C. B., N. S. 119.

(*k*) Payne *v.* Burridge, 12 M. & W. 727; Sweet, app., Seager, resp., 2 C. B., N. S. 119; Thompson *v.* Lapworth, L. R., 3 C. P. 149; 37 L. J., C. P. 74.

(*l*) Bird *v.* Elwes, L. R., 3 Ex. 225; 37 L. J., Ex. 91.

rates and assessments and outgoings whatsoever," was held, in Crosse *v.* Raw (*m*), to throw upon the tenant the obligation to pay for the making of a drain which, under the 10th section of the Sanitary Act, 1866 (*n*), the landlord as "owner" might have been required by the sewer authority to make, but which the tenant had made under an arrangement with the landlord by which the expense was to be borne by the party liable. Under the Public Health Act, 1875, sect. 23, the local authority has an option to give notice to the owner *or* occupier to make an improvement of this character, and to recover the expenses from the owner, *or* to declare them to be "private improvement expenses." A bishop not being able to bind his successors unless certain conditions and formalities are observed by him, a covenant by him to pay all charges, ordinary and extraordinary, does not include land tax (*o*).

In what proportion rates and taxes are to be paid. — When a lessee agrees to pay all rates, taxes, &c., he must pay the full amount thereof, notwithstanding any subsequent increase occasioned by additions and new buildings, of which he has the use and benefit during the term (*p*). But when a lessor covenants to pay any rate or tax, or it is specifically excepted from the lessee's covenant, and the annual value of the premises is afterwards increased by alterations and new buildings, the landlord is liable to pay, not the whole rate or tax as paid from time to time by the tenant, but only so much thereof as his rent or the annual value of the premises when demised bears to the improved annual value (*q*). Thus a landlord who covenants to pay the land tax, and save the tenant harmless, will discharge his covenant, if he pay the tax according to the rent he receives, although the prem-

(*m*) L. R., 9 Ex. 209; 43 L. J., Ex. 144. See Budd *v.* Marshall, and other cases, *post*, sect. 10; and as to water-rate, see Direct Spanish Telegraph Co. *v.* Shepherd, L. R., 13 Q. B. D. 202; and sect. 12, *post*.

(*n*) See now Public Health Act, 1875, ss. 23, 214, 226, 251.

(*o*) Bp. of Oxford *v.* Wise, cited in Blandford *v.* Marlborough, 2 Atk. 544; Davenant *v.* Bp. of Salisbury, 1 Ventr. 223; 2 Lev. 68.

(*p*) Hurst *v.* Hurst, 4 Exch. 571.

(*q*) Smith *v.* Humble, 15 C. B. 321; Watson *v.* Home, 7 B. & C. 285; Hyde *v.* Hill, 3 T. R. 377; Yeo *v.* Leman, 2 Stra. 1190; 1 Wils. 21.

[*559] ises may be taxed at a higher rate (*r*). *If the tenant be under-rated, he can only deduct pro ratâ (*s*). Where the tenant of a piece of ground, at a fixed annual rent, covenanted not to build without the licence of the lessor, and the lessor covenanted to pay all taxes charged or to be charged during the term, and at the time of executing the lease the lessor gave the lessee a licence to build, which he did, and thereby much increased the annual value of the premises; it was held, that the lessor was liable to pay taxes in proportion to the rent received, and not according to the improved annual value (*t*). Where A. granted a building lease to B. at the yearly rent of 7*l.*, who covenanted to pay all taxes except the land tax, and afterwards improved the estate, and sublet it at 54*l.* per annum; it was held, that A. was liable only to pay the land tax in proportion to the old rent (*u*). Under a covenant by a tenant for the payment of 80*l.* yearly rent, all taxes thereon being to him allowed; and also that he would pay all *further* or additional rates on the premises, or on any additional buildings or improvements made by him; and a covenant by the landlord to pay all rates on the premises or on the tenant, in respect of the said yearly rent of 80*l.*, except such further or additional taxes as may be assessed on the demised premises; the tenant was held bound to defray all increase of the old as well as the new rates, beyond the proportion at which the premises were rated at the time of the deed, which was 20*l.* in respect of the 80*l.* rent (*x*). Where the owner of a house, in consideration of a premium, demised it at one-third of its annual value, and afterwards redeemed the land tax, it was held, that he was entitled to receive from the tenant an annual payment equal to two-thirds of the land tax so redeemed (*y*).

Landlord's remedy. — When a tenant neglects to pay any

(*r*) Whitfield *v.* Brandwood, 2 Stark. 440; Yeo *v.* Leman, 2 Str. 1191; 1 Wils. 21; Barnfather *v.* Lee, cited 3 T. R. 379; Bramston *v.* Robins, 4 Bing. 11.

(*s*) Sherrington *v.* Andrews, Comb. 483; but see Werden *v.* Pickering there cited; Watson *v.* Home, 7 B. & C. 285, 2nd point.

(*t*) Watson *v.* Home, 7 B. & C. 285; Hyde *v.* Hill, 3 T. R. 377; Rex *v.* Scott, 3 T. R. 602.

(*u*) Barnfather *v.* Lee, cited 3 T. R. 379.

(*x*) Graham *v.* Wade, 16 East, 29; Watson *v.* Atkins, 3 B. & A. 647.

(*y*) Ward *v.* Const, 10 B. & C. 635.

rates, taxes, &c., pursuant to his covenant or promise in that behalf, the lessor may sue him for the breach of such covenant or promise (*z*), or he may maintain ejectment if the lease contain a proviso for re-entry applicable to such covenant or promise (*a*), but not otherwise.

Tenant's remedy by deduction from rent. — Where a landlord is liable to any rate or tax, which the tenant has paid, under actual or implied compulsion, the latter may deduct the amount from his rent, unless there is an express covenant or stipulation to the contrary (*b*). He is not entitled to make such deduction * until he has actually paid [*560] the rate or tax (*c*). The deduction should be made from the rent of the current year; and the tenant cannot claim it from his landlord at any subsequent period (*d*). On this ground, a plea in bar to a cognizance for a distress for rent, which stated that "divers sums, amounting to a certain sum, had been from time to time duly assessed and rated for the premises for land tax, and from time to time paid by the plaintiff, wherefore he deducted the said sum, being the amount of the tax which the defendant, as landlord, was liable to bear in respect of the rent," was held bad, for not stating the specific periods for which the respective sums were assessed or paid; and in not showing that the payment claimed to be deducted was made after the rent distrained for had accrued, or was then accruing (*e*). Where the landlord covenants to pay the land tax, the lessee is not entitled to deduct for more than would be assessed on the amount of his rent, although he may have actually paid more (*f*). Where by lease rent is to be paid without deduction, except for land tax and sewers rate, and the annual value of the premises is afterwards increased by alterations and new

(*z*) Hurst *v.* Hurst, 4 Exch. 571; Thompson *v.* Lapworth, L. R., 3 C. P. 149; 37 L. J., C. P. 74.

(*a*) Davis *v.* Burrell, 10 C. B. 821.

(*b*) Payne *v.* Burridge, 12 M. & W. 727; Sweet, app., Seager, resp., 2 C. B., N. S. 119; Hurst *v.* Hurst, 4 Exch. 571.

(*c*) Ryan *v.* Thompson, L. R., 3 C. P. 144; 37 L. J., C. P. 134.

(*d*) Andrew *v.* Hancock, 1 B. & B. 37; Cumming *v.* Bedborough, 15 M. & W. 438.

(*e*) Stubbs *v.* Parsons, 3 B. & A. 516.

(*f*) Whitfield *v.* Branwood, 2 Stark. 440.

buildings, the deduction is to be made not of the whole tax as paid, but only in proportion to the rent reserved as compared with the improved annual value of the premises (*g*). In one case, a succeeding tenant, who came in at Michaelmas (at which time a quarter's rent was due), and received from the former tenant a receipt for a year's property tax also due at Michaelmas, was held to be entitled to deduct the amount upon the landlord's distraining for half-a-year's rent at Christmas (*h*). A broker, who, when receiving rent under a distress, deducts a sum purporting to be for land tax, is not to be considered as *allowing* the land tax, so as to affect the landlord's right, but as merely, from not knowing how to act, consenting to receive the money without the sum deducted (*i*). Sums allowed by way of deduction from rent in respect of rates and taxes paid (although so allowed erroneously) operate as payment, and will support a defence of payment of so much of the rent (*k*).

Remedy by action. — Where a tenant has paid a tax, which his landlord is bound to pay, he may recover the amount paid by action (*l*). A tenant who has been compelled by the "building owner" to pay the proportion of the expenses of a party-wall or structure which was payable under the Metropolitan Building Act, 1855 (18 & 19 Vict. c. [*561] 122), by his *landlord, "the adjoining owner" may maintain an action against the latter to recover the sum so paid, and is not bound (though entitled) to deduct it from the rent due or accruing due (*m*). Where the tenant has paid his full rent, without deduction, *under protest*, because of a threat of distress, he may recover by action the amount of rates and taxes which he has paid for the landlord, and which the latter has improperly refused to allow (*n*); but where a tenant has omitted to deduct a landlord's tax (*o*), or voluntarily paid his full rent without deducting

(*g*) Smith *v.* Humble, 15 C. B. 321.
(*h*) Clennel *v.* Read, 7 Taunt. 50.
(*i*) Saunderson *v.* Hanson, 3 C. & P. 314.
(*k*) Waller *v.* Andrews, 3 M. & W. 312; Bramston *v.* Robins, 4 Bing. 11.
(*l*) Graham *v.* Tate, 1 M. & S. 609; Watson *v.* Home, 7 B. & C. 285.
(*m*) Earle *v.* Maugham, 14 C. B., N. S. 626.
(*n*) Baker *v.* Greenhill, 3 Q. B. 148.
(*o*) Cumming *v.* Bedborough, 15 M. & W. 428 (Property Tax).

a landlord's tax for a considerable time, he cannot recover it back. Thus, where the tenant of premises under a lease, which contained no reservation as to the payment of land tax, claimed a deduction for such tax, which was refused by the landlord, who afterwards distrained, and was paid the whole rent, and the tenant afterwards paid his full rent for five successive years, without claiming to deduct such tax; it was held, that such acquiescence was equivalent to a dereliction of his claim in the first instance; and that he could not recover back any of the sums so paid by him for land tax, in an action of assumpsit for money paid, on the ground of their being involuntary payments (*p*); and where an occupier of lands had, during a course of twelve years, paid to the collector of taxes the landlord's property tax, and the full rent as it became due to the landlord, without claiming any deduction on account of the tax so paid; it was held, that the occupier could not recover back from the landlord any part of the property tax so paid (*q*). But where a local act provided that a drainage tax of one shilling per acre should be paid by the tenants of the land charged with the same, and that the tenants might deduct the same out of the rents payable to their landlords; it was held, that a tenant who on the determination of his tenancy paid the full rent then due, without deducting the tax falling due on the determination of the tenancy, but not then called for, might recover from the landlord the amount of tax which he (the tenant) was afterwards compelled to pay, and would never have any opportunity to deduct from rent (*r*). Where a plaintiff demised a house to the defendant, who by the agreement was to pay a rent clear of all deductions for taxes and parochial rates; and after occupying the premises for some time, the defendant quitted them, leaving claims for land tax and poor's rates, which latter the landlord was obliged by a local act of parliament to pay, and he did pay them; it was

(*p*) Spragg *v.* Hammond, 2 B. & B. 59; 3 Moo. 431; Andrew *v.* Hancock, 1 B. & B. 37; 3 Moo. 278; Fuller *v.* Abbott, 4 Taunt. 105; Waller *v.* Andrews, 3 M. & W. 312; Stubbs *v.* Parsons, 3 B. & A. 516; Brisbane *v.* Dacres, 5 Taunt. 143.

(*q*) Denby *v.* Moore, 1 B. & A. 123.

(*r*) Dawson *v.* Linton, 5 B. & A. 521.

[*562] held, that he could not recover the *amount from the defendant in the action for money paid, but should have declared specially on the agreement, because as there was no original liability on the defendant to pay, it could not be said to be money paid to his use (*s*).

Remedy by defence to action for rent. — In an action for rent, the tenant may plead as to part, that he has paid a landlord's tax to that amount, in respect of the rent due to the plaintiff claimed by the declaration, after he has in fact paid the tax (*t*). In such action the validity of the rate or tax, or the plaintiff's liability to pay all or any part of it, may be disputed (*u*); or the plaintiff may reply that by the lease or agreement the defendant expressly agreed to pay all rates and taxes (*x*). In support of a plea of payment of a landlord's tax, the tenant should call the collector, and produce the assessment (*y*); but the latter has been held unnecessary (*z*).

Sect. 2. — *Rating of Landlord instead of Tenant, by Statute.*

Provision has in some cases been made by the Legislature, where the tenant's holding is of small value, for collecting rates from the landlord instead of the tenant, thus reversing the ordinary rule of the incidence of the rate upon the occupier. The principal statute upon this head, The Poor Rate Assessment and Collection Act, 1869, 32 & 33 Vict. c. 41, is set out at length in the Appendix (*a*); but it will be well to say a few words in this place on the general subject.

The earliest statute seems to be "Sturges Bourne's Act," 59 Geo. 3, c. 12. This by s. 19 empowers the vestry of any parish to pass a resolution that "the owner or owners of all houses, apartments, or dwellings" in the parish "being the immediate lessor or lessors of the actual occupier or occupiers, which shall respectively be let to the occupiers thereof at

(*s*) Spencer *v.* Parry, 3 A. & E. 331.

(*t*) Tinckler *v.* Prentice, 4 Taunt. 549; Baker *v.* Davis, 3 Camp. 474; Pocock *v.* Eustace, 2 Camp. 181.

(*u*) Lobban *v.* Cook, 3 H. & N. 238.

(*x*) Payne *v.* Burridge, 12 M. & W. 727.

(*y*) Gabell *v.* Shevell, 5 Taunt. 81.

(*z*) Phillips *v.* Beer, 4 Camp. 266.

(*a*) Appendix A.

any rent or rate not exceeding 20*l.* nor less than 6*l.* by the year or on any agreement by which the rent shall be reserved or made payable at any shorter period than 3 months," shall be assessed to the rates in respect of such houses instead of the actual occupiers. This section has no application to houses let at a weekly rent amounting to more than 20*l.* by the year (*b*). The same section provides that the resolution of the vestry may be rescinded from time to time, and that the sums assessed may upon non- [*563] payment be levied upon, and the payment thereof enforced against the owner and his goods.

But the 20th section provides that the goods of the occupier "shall be *liable* to be distrained and sold for raising so much of any such rate or assessment being in arrear, as shall have become due during the occupancy of the person whose goods shall be so distrained," providing also, however, that any occupier paying the rate or suffering a distress for it may deduct out of the rent payable by him the amount so paid or levied upon him.

The next act, 13 & 14 Vict. c. 99, commonly called the Small Tenements Act, being now repealed (*c*) it need only be stated that it empowered vestries to rate owners instead of occupiers in cases where the yearly rateable value did not exceed 6*l.*

"The Poor Rate Assessment and Collection Act, 1869," 32 & 33 Vict. c. 41, is the principal act upon the subject. This statue by s. 1 provides that the occupier of any rateable hereditament let to him for a less period than three months may deduct the amount paid by him for a poor rate from rent, and "that every such payment shall be a valid discharge of the rent to the extent of the rate so paid."

The 3rd section provides that owners may agree in writing with overseers to become liable for the poor rates assessed on hereditaments the rateable value of which does not exceed 20*l.* in the metropolis, or 13*l.* in Liverpool, or 10*l.* in

(*b*) Iles, app., Assessment Committee of West Ham Union, resps., L. R., 8 Q. B. D. 69; 51 L. J., Q. B., L. T., W. R. (C. A.), Baggallay, L. J., diss.

(*c*) By 32 & 33 Vict. c. 41, s. 6, and by the Statute Law Revision Act, 1875.

Manchester or Birmingham, or 8*l.* elsewhere; and the 4th section empowers a vestry to order owners to be rated instead of occupiers in all cases to which section 3 extends, except that a dwelling-house must be included in the rateable hereditament for the order to apply.

The deduction of part of certain rates from rent under the Rating Act, 1874, and the rating of owners instead of occupiers under the Public Health Act, 1875, is treated hereafter.

It may be well to mention here that the Royal Commission on Agriculture, which reported in 1882, was of opinion "that, without disturbing existing contracts of tenancy, all rates should in future be borne equally by owners and occupiers."

Sect. 3. — *Property Tax.*

Property and income tax acts. — The acts relating to property tax and income tax are very numerous (*d*), as the amount of these taxes varies from time to time according to the exigencies of the government. The principal act, [*564] passed * in 1842, is 5 & 6 Vict. c. 35, and the amount of the tax is now (January, 1886) eightpence (*e*).

Tenant entitled to deduct property tax. — The property tax, like most others, is a tenant's tax as between him and the public (*f*). But by 5 & 6 Vict. c. 35, s. 60, it is enacted that "the occupier of any lands, tenements, hereditaments, or heritages, *being tenant* of the same, and *paying the said duties*, shall deduct *so much thereof in respect of the rent payable* to the landlord for the time being (all sums allowed by the commissioners being first deducted) as a rate of [*pence*] for every twenty shillings thereof would by a just proportion amount unto, which deduction shall be made *out of the first payment thereafter to be made on account of rent;* and the receivers of her Majesty, and all landlords, both mediate and immediate, their respective heirs, executors, administrators,

(*d*) See Chit. Stat., 4th ed., vol. v., tit. "Property Tax."

(*e*) Customs and Inland Revenue Act, 1885, 48 & 49 Vict. c. 51, s. 22.

(*f*) Cumming *v.* Bedborough, 15 M. & W. 438.

and assigns, according to their respective interests, and their respective receivers or agents, shall allow such deduction *upon receipt of the residue of the rent*, under the penalty herein contained; *and the tenant paying the said assessment* shall be acquitted and discharged of so much money as if the same had actually been paid unto the person to or for whom his rent shall have been due and payable; and the occupier of lands charged on the amount of any composition rent, or payment for tithes arising therefrom, and paying the said duties, shall be entitled to make the like deduction from such composition rent or payment on paying the same" (*g*). So mesne landlords, by whom any such deduction shall have been allowed as aforesaid, may deduct and retain a just proportion thereof from the rent, &c., payable by them to their superior landlord (*h*).

By 5 & 6 Vict. c. 35, s. 73, it is provided that no contract, covenant or agreement between landlord and tenant, or any other persons touching the payment of taxes and assessments to be charged on their respective premises shall be deemed or construed to extend to the duties charged thereon under this act, nor to be binding contrary to the intent and meaning of this act; but that all such duties shall be charged upon and paid by the respective occupiers, subject to such reductions and repayments as are by this act authorized and allowed; and all such reductions and repayments shall be made and allowed accordingly, notwithstanding such contracts, covenants or agreements.

Penalty for refusing deduction. — By 5 & 6 Vict. c. 35, s. 103, if any person shall refuse to allow (inter alia) "any deduction authorized to be made by this act out of any rent or other annual payment mentioned in the 9th and 10th * Rules of No. IV., Schedule (A.), every such [*565] person shall forfeit the sum of fifty pounds; and all contracts, covenants and agreements made or entered into, *or to be made or entered into* (*i*), for payment of any interest, rent or other annual payment aforesaid, in full, without

(*g*) 5 & 6 Vict. c. 35, s. 60, Sched. (A.), No. IV., Rule "Ninth," incorporated in subsequent acts.

(*h*) Id. Rule "Tenth."

(*i*) As to the necessity for these words, see *Re* Knight, 1 Exch. 802.

allowing such deduction as aforesaid, shall be utterly void," i. e. the particular stipulation shall be void (*k*).

Larger rent, subject to reduction, good. — A larger rent, however, may be reserved, subject to a reduction on the repeal or diminution of the property tax (*l*).

Repayment by landlord. — It has been held by the Court of Appeal that an agreement, that if the tenant will continue to pay his rent in full, without any deduction in respect of landlord's property paid by him, the landlord will repay to the tenant all sums which he has paid, or shall pay for the landlord's property tax, is not invalid as being contrary to this section (*m*).

When the deduction may be made. — A tenant is not entitled to make any deduction in respect of property tax until he has *actually paid* the amount (*n*). Such payment operates as a payment pro tanto of the rent then due, or then accruing (*o*). It was held in Cumming *v.* Bedborough that where the tenant omitted to deduct the tax on his *next payment of rent*, he could not afterwards recover the amount as "money paid" to the use of the landlord (*p*). By statute 27 Vict. c. 18, s. 15, however, the tenant has the right to deduct the tax from subsequent rent "during the period through which the same was accruing due" (*q*).

Penalty on landlord not allowing deduction. — If the landlord or his agent wrongfully refuse to allow the deduction, he will be liable to a penalty of 50*l.* on each occasion (*r*). Such penalty may be recovered, either by her Majesty's attorney-

(*k*) Gaskell *v.* King, 11 East, 165; Fuller *v.* Abbott, 4 Taunt. 105; Tinckler *v.* Prentice, 4 Taunt. 549; Howe *v.* Synge, 15 East, 440.

(*l*) Colbron *v.* Travers, 12 C. B., N. S. 181; 31 L. J., C. P. 257; Beadel *v.* Pitt, 13 W. R. 287; 11 Jur., N. S. 152. As to annuity, see Abadam *v.* Abadam, 33 Beav. 475; 33 L. J., Ch. 593; and as to rent-charge (which may be devised free of property-tax), see Festing *v.* Taylor, 32 L. J., Q. B. 41, Ex. Ch.

(*m*) Lamb *v.* Brewster, L. R., 4 Q. B. D. 607; 48 L. J., Q. B. 421; 40 L. T. 537; 27 W. R. 478, — affirming decision below.

(*n*) *Ante*, 559.

(*o*) Baker *v.* Davis, 3 Camp. 474; Franklin *v.* Carter, 1 C. B. 750; 3 D. & L. 213, cited 15 M. & W. 551.

(*p*) Cumming *v.* Bedborough, 15 M. & W. 438; Denby *v.* Moore, 1 B. & A. 123; Spencer *v.* Parry, 3 A. & E. 331.

(*q*) 27 Vict. c. 18, s. 15.

(*r*) 5 & 6 Vict. c. 35, s. 103, *ante*, 564; Reg. *v.* Sheil, 1 F. & F. 204; Att.-Gen. *v.* Shield, 3 H. & N. 834; 28 L. J., Ex. 49.

general on behalf of the crown, or in a qui tam action or information commenced in the Queen's Bench Division (*s*) of the High Court within twelve calendar months from the time of the penalty being incurred (*t*). But the attorney-general may stay any such qui tam action or information by entering a nolle prosequi, or otherwise, in case it shall appear to his satisfaction that any penalty or forfeiture was incurred without intention of fraud (*u*).

* **Income tax payable on royalties.** — Income tax is [*566] payable upon royalties in the case of a demise, but not of a sale. In Edmonds *v.* Eastwood a piece of land was *demised*, with power to the lessee to get from the land clay, brick earth and other materials for making bricks, and to make the same into bricks upon the premises for a term of fourteen years, paying to the lessor the yearly sum of 17*l.* 10*s.* for surface rent, by quarterly payments; also paying to the lessor for royalty or brick rent the yearly sum of 100*l.*, by four equal quarterly payments on the same days; and also paying in respect of every thousand bricks over and above the first million which should be made on the premises in any one year, an additional royalty or brick rent of 2*s.*, to be paid on the last day of every year. It was held, that both the royalties or brick rents were chargeable with income tax, and that it was payable in the first instance by the lessee, who was entitled to deduct it from the amount due to the lessor (*x*). In such a case the royalties would go to the heir rather than to the executor of the lessor (*y*), although where a mine is *sold* and the purchase-money is made payable by fifty annual instalments, such instalments constitute capital (not income), and no income tax ought to be paid or deducted in respect thereof (*z*).

(*s*) Judicature Act, 1873, s. 34, as amended by Order in Council.

(*t*) 5 & 6 Vict. c. 35, s. 185, referring to 43 Geo. 3, c. 99, ss. 62, 63; Reg. *v.* Sheil, 1 F. & F. 204.

(*u*) Ib. s. 62. The 185th section gives costs; and this seems not to be impliedly repealed by Rules of the Supreme Court, Order LXV., which places costs in the discretion of the court.

(*x*) Edmonds *v.* Eastwood, 2 H. & N. 811; 27 L. J., Ex. 209.

(*y*) Barrs *v.* Lea, 33 L. J., Ch. 437; 10 Jur., N. S. 996.

(*z*) Taylor *v.* Evans, 1 H. & N. 101; 25 L. J., Ex. 269; Lady Emily Fovey *v.* Fletcher, 3 H. & N. 769; 28 L. J., Ex. 100.

In estimating the value of a succession to land under the 16 & 17 Vict. c. 51, the successor is not entitled to a deduction for income tax, or the agent's charges for collecting rents (*a*).

SECT. 4. — *Land Tax.*

Land tax acts. — The principal Land Tax Acts are 38 Geo. 3, c. 5, made perpetual by 38 Geo. 3, c. 60; amended by 42 Geo. 3, c. 116; 53 Geo. 3, c. 142; 17 & 18 Vict. c. 85; 19 & 20 Vict. c. 80, s. 4. Additional commissioners were appointed by 32 & 33 Vict. c. 64, and several previous acts therein mentioned.

Redemption acts. — The Land Tax Redemption Acts are very numerous. The principal ones are 42 Geo. 3, c. 116; 16 & 17 Vict. cc. 74, 90, 117; 19 & 20 Vict. c. 80, ss. 3, 4 (*b*).

Application of excess. — The application of moneys arising from the excess or surplus of land tax assessed in [*567] any particular parish or place beyond the quota * or proportion payable by such parish or place, is provided for by 6 Geo. 4, c. 32, as amended by 24 & 25 Vict. c. 91, ss. 39 — 44. It is to be applied in or towards redemption of the land tax chargeable upon such parish or place.

Land tax — how charged. — By 38 Geo. 3, c. 5, s. 4, the land tax (then about 4*s.* in the pound) was directed to be rated and charged in manner therein mentioned upon all hereditaments in *England*, *Wales*, and *Berwick-upon-Tweed*, and upon all persons "having or holding" any such hereditaments "in respect thereof."

May be levied by distress and sale, or by commitment. — By sect. 17, it is to be levied and raised, when necessary, by distress and sale, with power to break open outer doors, &c., in the presence of a constable; and with power to the commissioners of land tax to commit defaulters to prison, there to remain until the arrears of land tax, with costs, are paid. But a distress may not be made immediately after the tax is

(*a*) *In re* Elwes, 3 H. & N. 719; 28 L. J., Ex. 46.

(*b*) See the whole series of acts in Chitty's Statutes, 4th ed., vol. 3, tit. "Land Tax."

demanded; there must be a refusal, or a neglect and default to pay the tax, and a reasonable time after demand made should be allowed, otherwise the distress will be illegal (*c*). An outer door, &c., cannot be broken open to levy land tax, except in the presence of a constable (*d*).

Power to deduct proportionate part from rent. — By the same sect. 17, "the several and respective tenant or tenants of all houses, &c., which shall be rated by virtue of this act, are hereby required and authorized to pay such sum or sums of money as shall be rated upon such houses, &c., and *to deduct out of the rent so much of the said rate as, in respect of the said rents* of any such houses, &c., the landlord should and ought to pay and bear; and the said landlords, both mediate and immediate, according to their respective interests, are hereby required to allow such deductions and payments upon the receipt of the residue of the rents."

Acquittance from rent, pro tanto. — Commissioners to settle disputes. — By sect. 18, "every tenant paying the said assessment or assessments last mentioned shall be acquitted and discharged of so much money as the said assessment or assessments shall amount unto, as if the same had actually been paid unto such person or persons to whom his rent shall have been due and payable;" with power to the commissioners of land tax, or any two of them, to settle, as they shall think fit, any differences between landlord and tenant, or any other, concerning the said rates. When they have decided any such difference the court will not re-examine it (*e*).

Express contracts as to rates and taxes. — Sect. 35 provides, "that nothing in this act contained shall be construed to alter, change, or determine, or make void any contracts, covenants, or agreements whatsoever between landlord and tenant, or any other persons, touching the payment of taxes and assessments in * England, Wales, and Berwick- [*568] upon-Tweed; anything herein contained to the contrary notwithstanding."

(*c*) Gibbs *v.* Stead, 8 B. & C. 528.
(*d*) Foss *v.* Racine, 8 C. & P. 699; 4 M. & W. 419; 7 Dowl. 53.
(*e*) Brockman *v.* Honywood, 1 P. Wms. 328.

The land tax is to be rated and charged upon the person "having or holding" the property "in respect thereof" (*f*). It is a tenant's tax, as between him and the public (*g*). But, in the absence of any express stipulation to the contrary, the tenant is entitled to deduct out of the current or accruing rent, when paid by him (*h*), not the whole rate as paid, but only so much thereof as the rent paid to his immediate landlord bears to the assessed annual value of the demised premises; and such landlord may deduct out of the next rent paid by him to his superior landlord so much of the rate as such last-mentioned rent bears to the assessed annual value of the property, and so on, toties quoties (*i*). When an outgoing tenant who has paid the land tax hands over the receipt to the succeeding tenant, it seems that the latter may have the allowance of it (*k*).

Express contracts by tenants. — Any contract by a tenant to pay the land tax, or to pay "all rates and taxes," will render him liable to pay the whole land tax, without making any deduction from his rent in respect thereof (*l*). Even an oral agreement to pay "all taxes" (not specifically mentioning the land tax) will be sufficient for this purpose (*m*). Under an agreement for a lease at the yearly rent of 40*l*., payable quarterly, "free of all outgoings," the tenant ought to pay the land tax and tithe commutation rent-charge, and the landlord is entitled to have a covenant to that effect inserted in the lease (*n*). The land tax is a "parliamentary tax" within the meaning of an agreement to pay rent "and all taxes, parliamentary and parochial" (*o*), but not a parochial tax (*p*).

(*f*) 38 Geo. 3, c. 5, s. 4, *ante*, 567.

(*g*) R. *v.* Mitcham, Cald. 276 (a); Doug. 226, Buller, J.; Watson *v.* Home, 7 B. & C. 285; Const *v.* Ward, 10 B. & C. 649. So is the property tax; Cumming *v.* Bedborough, 15 M. & W. 438.

(*h*) Andrew *v.* Hancock, 1 Brod. & B. 37; 3 Moo. 278; Denby *v.* Moore, 1 B. & A. 123; Stubbs *v.* Parsons, 3 B. & A. 516; Carter *v.* Carter, 5 Bing. 406.

(*i*) 38 Geo. 3, c. 5, s. 17, *ante*, 567.

(*k*) Clennel *v.* Read, 7 Taunt. 50.

(*l*) 38 Geo. 3, c. 5, s. 35, *ante*, 567; Gibs *v.* Hooper, Carth. 135; Brewster *v.* Kitchell, 1 Ld. Raym. 317; Christ's Hospital *v.* Harrild, 2 M. & G. 707.

(*m*) Amfield *v.* White, Ry. & Moo. 246; Hopwood *v.* Barefoot, 11 Mod. 237.

(*n*) Parish *v.* Sleeman, 1 De G., F. & J. 326; 29 L. J., Ch. 96.

(*o*) Manning *v.* Lunn, 2 C. & K. 13; Christ's Hospital *v.* Harrild, *supra*.

(*p*) Waterloo Bridge Co. *v.* Cull, 1

Express contract by landlord. — When the tenant covenants or agrees to pay all rates, taxes and impositions, *except land tax*, or when the landlord covenants or agrees to pay the land tax, or "all rates and taxes" (which would include the land tax), and new buildings are subsequently erected, or other improvements made, during the term, whereby the amount of land tax is increased, the landlord is bound to allow the tenant to deduct from his rent only so much of the land tax as would have been payable for the premises in the state in which they were demised, and not such part of the land tax as is occasioned by the new buildings or
* other improvements, of which the tenant has the [*569] use or benefit (*q*). The result is, that the lessor is bound to pay such proportion only of the land tax as the reserved rent bears to the total annual value (*r*).

A distress for land tax is no breach of a landlord's covenant for quiet enjoyment, without interruption by him or any other person claiming "by, from or under him" (*s*).

Redemption of land tax. — The terms on which land tax may now be redeemed or purchased are (*t*) 17*l.* 10*s.* per cent. less than under 42 Geo. 3, c. 116, ss, 22, 23. But no person can now, by 16 & 17 Vict. c. 117, s. 1, redeem or purchase any land tax except those "having an estate or interest" in the hereditaments whereon such land tax is charged, and to whom a preference in the redemption of land tax was given for a limited period by 42 Geo. 3, c. 116. A tenant may redeem land tax under this act.

Land tax redeemed may be recovered by rent. — Where a tenant is bound to pay the land tax, the amount of it, if redeemed by the person entitled to the rent, is payable and may be recovered as rent (*u*). Where the owner of a house in consideration of a premium demised it at one-third of its annual value, and afterwards redeemed the land tax, it was

E. & E. 213; 28 L. J., Q. B. 70; 29 Id. 10.

(*q*) Hyde *v.* Hill, 3 T. R. 377; Graham *v.* Wade, 16 East, 29; Whitfield *v.* Brandwood, 2 Stark. R. 441; Watson *v.* Home, 7 B. & C. 285; Smith *v.* Humble, 15 C. B. 321.

(*r*) Ward *v.* Const, 10 B. & C. 649, 654.

(*s*) Stanley *v.* Hayes, 3 Q. B. 105.

(*t*) 16 & 17 Vict. c. 74; and see the other statutes mentioned *ante*, 566.

(*u*) 42 Geo. 3, c. 116, s. 126.

held that he was entitled to recover from the tenant an annual payment equal to two-thirds of the land tax so redeemed (*x*); and where the owner of land subject to a fee-farm rent redeemed the land tax, that he was entitled to deduct a proportionate part of the land tax from such fee-farm rent (*y*). But a remainderman in possession can compel the representatives of the tenant of a previous particular estate, who has redeemed the land tax, to receive the consideration money for such redemption, with all arrears of interest, so as to free the land from the charge and payment of the interest to which it was subject for the benefit of such tenant, under 42 Geo. 3, c. 116, s. 123 (*z*). The second section of 16 & 17 Vict. c. 117, which enacted, that for the future land tax when redeemed should always merge in the property, was repealed by 19 & 20 Vict. c. 80, s. 3. It was probably found that few redemptions of land tax took place under such circumstances.

SECT. 5. — *Sewers Rates.*

Sewers acts. — The principal acts relating to sewers and sewers rates are 23 Hen. 8, c. 5 (made perpetual by
[*570] 3 & 4 Edw. 6, c. 8); 13 Eliz. c. 9; 7 Ann. * c. 10; 3 & 4 Will. 4, c. 22; 4 & 5 Vict. c. 45; 12 & 13 Vict. c. 50; 24 & 25 Vict. c. 133 (*a*).

Metropolitan Sewers Acts. — The Metropolitan Sewers Acts are 11 & 12 Vict. c. 112, amended by 12 & 13 Vict. c. 93; 14 & 15 Vict. c. 75; 15 & 16 Vict. c. 64; 16 & 17 Vict. c. 125; 17 & 18 Vict. c. 111; 18 & 19 Vict. c. 120 (*b*); 19 & 20 Vict. c. 112; 21 & 22 Vict. c. 104; 23 & 24 Vict. c. 51.

Sewers within urban districts. — Sewers within the district of any urban authority are provided for by the Public Health Act, 1875 (*c*). Real property within the district of a local

(*x*) Ward *v.* Const, 10 B. & C. 635.

(*y*) Moody *v.* Dean and C. of Wells, 1 H. & N. 40; 25 L. J., Ex. 273.

(*z*) Cousins *v.* Harris, 12 Q. B. 726.

(*a*) See 5 Burn's Justice, 415–419 (30th ed. 1869).

(*b*) See particularly ss. 68—89, 145—148, 163, 164, 169, 181, 182 of this act; Reg. *v.* Great Western R. Co., E., B. & E. 600; Reg. *v.* Head, 3 B. & S. 419; 32 L. J., M. C. 115; Re Pittiward, 19 C. B., N. S. 489; 34 L. J., C. P. 301.

(*c*) 38 & 39 Vict. c. 55, s. 13 *et seq.*

board of health cannot be assessed to a district rate for the purpose of defraying the expenses of sewers for the benefit of the district, unless there be some person having such an occupation as would make him liable to the poor rate in respect thereof (*d*).

A landlord's tax. — Under the Statutes of Sewers, every person whose property derives benefit from the works of the commissioners is liable to be rated, although the benefit be not immediate (*e*). The sewers rate is not an annual tax. It is a charge in respect of the improvement of the fee simple of the land (*f*). In the absence of any special stipulation to the contrary, a sewers rate for extraordinary repairs falls upon the landlord, but a rate for ordinary annual repairs falls on the tenant (*g*), and, if necessary, the commissioners of sewers will, on appeal to them, decide by whom and in what proportion any particular rate shall be borne (*h*).

Tenant must pay increase of rate caused by new buildings, &c. — The tenant or occupier pays the rate in the first instance (*i*), and afterwards is entitled to deduct from the next payment of his current rent so much of the rate as the landlord ought to bear; in like manner as with respect to land tax (*k*). Where A. demised land to B. upon a building lease, at the yearly rent of 60*l*., "clear of all parliamentary, parochial, and other taxes, rates, assessments and deductions whatsoever (the sewers rate, land tax and landlord's property or income tax only excepted)," with the usual covenant to pay the rent without any deduction or abatement whatsoever (except on account of the sewers rate, land tax and landlord's property or income tax): and B. having, by building on the land, increased its rateable value to 300*l*. per annum: it was held, that he was only entitled to deduct the sewers rate and land tax *upon the original rent*, and not in respect to the improved value (*l*).

(*d*) Hodgson, app., Carlisle Local Board, resp., 8 E. & B. 116; Reg. *v.* Licensed Victuallers' Society, 1 B. & S. 71.

(*e*) Brady *v.* Wilson, 3 A. & E. 248.

(*f*) Smith *v.* Humble, 15 C. B. 330.

(*g*) Callis on Sewers, 140.

(*h*) Callis on Sewers, 143; Coote L. & T. 278; Payne *v.* Burridge, 12 M. & W. 730.

(*i*) Callis, 140; Soady *v.* Wilson, 3 A. & E. 248.

(*k*) *Ante*, 566; Smith *v.* Humble, 15 C. B. 321.

(*l*) Smith *v.* Humble, 15 C. B. 321.

[*571] *** Not a "parliamentary" tax.** — A sewers rate properly so called, not being imposed *directly* by act of parliament, but by the authority and judgment of the commissioners of sewers, is not a "parliamentary" tax (*m*); and therefore a tenant who has agreed to pay "all taxes, parochial and parliamentary," may, after paying a sewers rate, deduct the amount from his next rent (*m*); or such proportion thereof as the landlord ought to bear (*n*). But where a tenant of marsh lands agreed to pay *all outgoings* whatsoever, rates, taxes, *scots*, &c., whether parliamentary or parochial (the land tax only excepted): it was held, that an extraordinary assessment made by commissioners of sewers upon the land, for a work of permanent benefit to the land, was a "scot and outgoing" within the meaning of the agreement (*o*).

Sect 6. — *Poor Rates.*

Origin and nature of poor rates. — The statute 43 Eliz. c. 2, which may be considered the origin and foundation of our poor laws, empowers the churchwardens of every parish to raise rates for the support of the poor "by taxation of every inhabitant, parson, vicar and other, and of *every occupier* of lands, houses, tithes impropriate, propriations of tithes, coalmines or saleable underwoods in the said parish" (*p*).

Principal statutes. — Amongst the numerous statutes (*q*) relating to poor rates passed subsequently to the above statute, the more important are the Parochial Assessment Act (6 & 7 Will. 4, c. 96), the Union Assessment Committee Act (25 & 26 Vict. c. 103), and the Rating Act, 1874 (37 & 38 Vict. c. 54).

The occupier is rateable generally. — The poor rate is not a tax on the land, but a personal charge in respect of the land: in general, therefore, the farmer or occupier, and not the landlord, is liable to this tax; for the rate is a charge

(*m*) Palmer *v.* Earith, 14 M. & W. 428.
(*n*) Smith *v.* Humble, *supra*.
(*o*) Waller *v.* Andrews, 3 M. & W. 312.
(*p*) See 4 Burn's Justice, 844—1090 (30th ed. 1869).
(*q*) See 5 Chit. Stat. tit. Poor (Rating) (4th ed.).

upon the occupier in respect of his possession, and not on the lessor in regard to the rent received (*r*). But this is now altered where the demise is for three months, or less (*s*). As the *occupier* of land is rateable, it is immaterial by what tenure he holds, or whether he has any title or not: thus if a disseisor obtain possession of land, he is rateable as the occupier of it (*t*): but it has been considered, that an *administrator is not liable to pay poor's rate for the *[572] intestate, at least that he is not distrainable without a summons (*u*). It seems, however, that an executor or administrator is liable to poor rates (*x*). Any one of several joint occupiers is liable for the whole amount of their joint assessment to a poor rate; and a warrant of distress against any one alone is good (*y*). A corporation may be inhabitants and occupiers of land, and as such liable to be rated in their corporate capacity (*z*). A lessee for a term of years of a private box in a theatre is rateable under a local act, by which all persons are rateable who "inhabit, hold, occupy, possess or enjoy any land, house, shop, wharf, warehouse, or any other building, tenement, or hereditament, or other persons who by law are chargeable" (*a*). No deductions are now allowed for repairs done or agreed to be done by the tenant, nor for contingent or future renewal of buildings or machinery (*b*). Consequently the rateable value more nearly equals the rack-rent than it formerly used to do.

Occupancy by servant only. — The words "inhabitant" and "other," in 43 Eliz. c. 2, mean *resident* inhabitants and other inhabitants. If a man do not live within a parish he is to be assessed according to his land; but if he live within the parish, he is to be rated as dwelling there. The resi-

(*r*) Rowls *v.* Gells, Cowp. 452; 1 Doug. 304.

(*s*) 32 & 33 Vict. c. 41, s. 1, see *post*, Appendix A., where the act is set out *verbatim*.

(*t*) Ld. Bute *v.* Grindall, 2 H. Blac. 260; 1 T. R. 343; Rex *v.* Bell, 7 T. R. 398; Rex *v.* Skingle, 7 T. R. 549; 1 Bott's P. L. 127.

(*u*) Stevens *v.* Evans, 1 W. Blac. 284; 2 Burr. 1152.

(*x*) Reg. *v.* Kirby, 1 B. & S. 647.

(*y*) Paynter *v.* The Queen, 10 Q. B. 908.

(*z*) Rex *v.* Gardiner, Cowp. 79; Rex *v.* Mayor of Sudbury, 1 B. & C. 389.

(*a*) Reg. *v.* St. Martin's, 3 Q. B. 204.

(*b*) Reg. *v.* Wells, 8 B. & S. 607; L. R., 2 Q. B. 542; 36 L. J., M. C. 109.

dence in a lighthouse by the servant of the owner, at an annual salary, to take care of the light, is the occupation of the master, who alone can be rated in respect of such occupation of the lighthouse (*c*). A servant who engaged and occupied a house and garden, the rent and taxes of which were paid by his master, was held liable to be rated as occupier, and not the master (*d*). The trustees of premises not demised to any one, but who meet occasionally on the premises for the purposes of the trust (the actual occupants being the servants and others who are employed in the objects of the trust), are the persons rateable (*e*). The proprietor of a toll traverse who demises it from year to year *by parol* is properly rateable, as the lessee is a mere bailiff for the collection of it (*f*).

Partial occupancy. — If the owner of a house occupy part of it, he is liable to be rated for the whole, unless there be a distinct occupation of the rest by some other person (*g*). A subtenant of part is not liable to be rated for the whole of the premises; the rate should be either upon the immediate landlord in respect of his entire interest, or upon each [*573] *sub-tenant in respect of such portion of the premises as he occupies (*h*). Where a man went from home with his family for nearly a year, but left his assistant to carry on his business in his shop in one room of the house, which for this purpose was parted off by laths from the rest; and he left the key of the house door with a friend, and had the garden cultivated for his own benefit as usual; it was held that he was liable to be rated to the relief of the poor as occupier of the whole house (*i*).

Rating of hereditaments demised for three months or less. — By 32 & 33 Vict. c. 41, s. 1 (*k*), the occupier of a rateable hereditament let to him for not more than three months is entitled to deduct the amount paid by him, in respect of any

(*c*) Rex *v.* Tynemouth, 12 East, 46.
(*d*) Reg. *v.* Lynn, 8 A. & E. 379.
(*e*) Reg. *v.* Sterry, 12 A. & E. 84.
(*f*) Reg. *v.* Marquis of Salisbury, 8 A. & E. 716.
(*g*) Rex *v.* St. Mary the Less, Durham, 4 T. R. 477.
(*h*) Lobban *v.* Cook, 3 H. & N. 238.
(*i*) Rex *v.* Aberystwith, 10 East, 354.
(*k*) See *post*, Appendix A., Sect. 6.

poor rate assessed thereupon, from the rent due or accruing due to the owner.

In the metropolis an owner or lessee who is liable to be assessed for any rate in the place of the occupier or tenant, or does in fact pay any such rate in his place under any contract or arrangement with him, is, by s. 2 of the Valuation Metropolis Amendment Act, 1884, 47 Vict. c. 5, deemed to be the ratepayer having the right of appeal against the assessment committee.

Rating of iron mines, &c. — Under the statute 43 Eliz. c. 2, no other mines than coal mines were rateable, but now, by the Rating Act, 1874 (37 & 38 Vict. c. 54), s. 3, all the poor rate acts extend to mines of every kind. The 8th section of the Act of 1874 provides that "where any poor or other local rate, which at the commencement of this act any lessee, licensee, or grantee of a mine is exempt from being rated to in respect of such mine, becomes payable by him in respect of such mine during the continuance of his lease, grant or licence, or before the arrival of the period at which the amount of the rent, royalty or dues is liable to revision or re-adjustment, he may (*unless he has specifically contracted* (*l*) to pay such rate in the event of the abolition of the said exemption) deduct from any rent, royalty or dues payable by him one-half of any such rate paid by him: provided that he shall not deduct any sum exceeding what one-half of the rate in the pound of such poor or other local rate would amount to if calculated upon the rent, royalty, or dues so payable by him."

Rating of plantation, &c. under Rating Act. — The Rating Act, 1874, s. 3, also extends the operation of the poor rate acts to "land used for a plantation or a wood, or for

(*l*) A covenant to pay rent "free of all rates, taxes, and deductions whatsoever, parliamentary, parochial, or of any other nature" is not within this exception. Devonshire (Duke of) *v.* Barrow Hematite Steel Co., L. R., 2 Q. B. Div. 286 (C. A.); nor is a covenant to "pay or cause to be paid all manner of taxes, rates, assessments, charges, and impositions whatever, parliamentary or parochial, which now are or which shall at any time or times hereafter during the continuance of this demise be taxed, rated, charged, assessed, or imposed upon the said demised mines and premises, the landlord's property tax only excepted;" Chaloner *v.* Bolckow, 39 L. T. 134; 26 W. R. 541—H. L.

[*574] the * growth of saleable underwood, and not subject to any right of common."

Deduction by tenant. — By sect. 5, "where the rateable value of any land used for a plantation or a wood, or both for a plantation or wood and for the growth of saleable underwood, is increased by reason of the same being estimated in accordance with this act, the occupier of that land under any lease or agreement made before the commencement of this act, may, during the continuance of the lease or agreement, deduct from his rent any poor or other local rate, or any portion thereof, which is paid by him in respect of such increase of rateable value, and every assessment committee, on the application of such occupier, shall certify in the valuation list, or otherwise, the fact and amount of such increase."

The Rating Act, 1874, s. 3, also extends the operation of the poor rate acts to such incorporeal hereditaments as "rights of fowling, of shooting, of taking or killing game or rabbits, and of fishing, when severed from the occupation of the land."

Rating of rights of sporting, &c. — By sect. 6 "(1), where any right of fowling, or of shooting, or of taking or killing game or rabbits, or of fishing (hereinafter referred to as a right of sporting), is severed from the occupation of the land, and is not let, and the owner of such right receives rent for the land, the said right shall not be separately valued or rated, but the gross and rateable value of the land shall be estimated as if the said right were not severed; and in such case, if the rateable value is increased by reason of its being so estimated, but not otherwise, the occupier of the land may (unless he has specifically contracted (*m*) to pay such rate in the event of an increase) deduct from his rent such portion of any poor or other local rate as is paid by him in respect of such increase; and every assessment committee, on the application of the occupier, shall certify in the valuation list, or otherwise, the fact and amount of such increase.

(*m*) See note (*l*), *supra*. For cases prior to the act, see Chap. XVIII., *post*.

"(2.) Where any right of sporting, when severed from the occupation of the land, is let, either the owner or the lessee thereof, according as the persons making the rate determine, may be rated as the occupier thereof.

"(3.) Subject to the foregoing provisions of this section the owner of any right of sporting, when severed from the occupation of the land, may be rated as the occupier thereof.

"(4.) For the purpose of this section the person who, if the right of sporting is not let, is entitled to exercise the right, or who, if the right is let, is entitled to receive the rent for the same, shall be deemed to be the owner of the right."

*** Local rate.** — Local rate, by s. 15, means any [*575] "county rate, borough rate, highway rate, and other local rate leviable upon property rateable to the relief of the poor."

In case of bankruptcy. — When a tenant becomes bankrupt, all parochial and other local rates to which he is liable rank, with certain other liabilities, as preferential debts (*n*).

Sect. 7. — *Assessed Taxes* (*o*).

Window duties repealed. — The window duties under 48 Geo. 3, c. 55, were repealed by 14 & 15 Vict. c. 36, which imposed the following house duties, viz.: —

"For every *inhabited* dwelling-house which, with the household and other offices, yards and gardens therewith occupied and charged, is or shall be *worth the rent of* 20*l. or upwards* by the year:

Where any such dwelling-house shall be occupied by any person in trade, who shall expose to sale and sell any goods, wares or merchandise, in any shop or warehouse, being part of the same dwelling-house, and in the front and on the ground or basement story thereof:

And also where any such dwelling-house shall be occupied by any person who shall be duly licensed by the laws in

(*n*) Bankruptcy Act, 1883, s. 40.

(*o*) See 5 Burn's Justice, 779—916 (30th ed. 1869).

force to sell therein by retail beer, ale, wine or other liquors, although the room or rooms thereof in which any such liquors shall be exposed to sale, sold, drunk or consumed, shall not be such shop or warehouse as aforesaid:

And also where any such dwelling-house shall be a farm-house occupied by a tenant or farm servant, and bonâ fide used for the purposes of husbandry only, —

There shall be charged for every twenty shillings of such annual value of any such dwelling-house the sum of *sixpence;*

And where any such dwelling-house shall not be occupied and used for any such purpose and in manner aforesaid, there shall be charged for every twenty shillings of such annual value thereof the sum of *ninepence.*"

Exemption of trade premises. — By 30 & 31 Vict. c. 90, s. 25, "From and after the 5th day of April, 1867, in order to entitle the occupier of any tenement or building, or part of a tenement or building, to exemption from inhabited house duties on the ground of such premises being occupied as a house for the purposes of trade only, or as a warehouse for the sole purpose of lodging goods, wares or mer-
[*576] chandise therein, or as a *shop or counting-house, it shall not be necessary to prove, nor shall proof be required, that such occupier resides in a separate and distinct dwelling-house or part of a dwelling-house charged with the said duties."

Exemption from inhabited house duties. — By 32 & 33 Vict. c. 14, s. 11, "From and after the 5th day of April, 1869, any tenement or part of a tenement occupied as a house for the purpose of trade only, or as a warehouse for the sole purpose of lodging goods, wares or merchandise therein, or as a shop or counting-house, shall be exempt from inhabited house duties, although a servant or other person may dwell in such tenement, or part of a tenement, for the protection thereof."

Tenant's Taxes. — In the absence of any special stipulation to the contrary all assessed taxes fall upon the tenant, who has the use and enjoyment of the articles taxed, and has no right to deduct any part of such taxes from his rent.

Effect of exemptions in local acts. — A local act which exempts certain land from all taxes and assessments whatsoever will not exonerate such land from house duty or other taxes imposed by subsequent public general acts (*p*).

Sect. 8. — *County Rates.*

County rate acts. — The assessment and collection of county rates are regulated by 15 & 16 Vict. c. 81, as altered by 21 & 22 Vict. c. 33 (*q*). By 15 & 16 Vict. c. 81, s. 6, "for the purposes of preparing 'the basis for the county rate as in the act mentioned,' the words 'full and fair annual value' shall be taken to mean the net annual value of any property as the same is or may be required by law to be estimated for the purpose of assessing the rates for the relief of the poor."

Parliamentary taxes. — "A county rate is not a parliamentary tax, although it is in one sense made by parliament; but the rate is not fixed or assessed by act of parliament" (*r*), but by the justices at quarter sessions, subject to an appeal (*s*). It is not a tax or tollage within the meaning of the privilege of tenants in ancient demesne as to exemption from taxes and tollages granted by a parliament, unless specially named (*t*).

Parochial tax. — It seems, however, to be a parochial tax, being paid out of the poor's rate (*u*). The county rate is collected together with the poor's rate, and of course falls upon the tenant, who has no right to deduct any part thereof * from his rent, in the absence of any special [*577] stipulation to the contrary.

Unoccupied houses. — Unoccupied houses capable of being rated ought to be included in the valuation (*x*), but an incoming tenant will have to pay only his proportion according to the time of his occupation (*y*).

(*p*) Perchard *v.* Heywood, 8 T. R. 468.

(*q*) See 2 Chit. Stat. (4th ed.) tit. County Rate.

(*r*) 14 M. & W. 428, Alderson, B.

(*s*) 15 & 16 Vict. c. 81, ss. 21, 22; 21 & 22 Vict. c. 33.

(*t*) Reg. *v.* Aylesford, 2 E. & E. 538; 29 L. J., M. C. 83.

(*u*) Reg. *v.* Aylesbury-with-Walton, 9 Q. B. 261.

(*x*) Reg. *v.* Hammersmith, 31 L. J., Q. B. 3; 7 W. R. 524.

(*y*) 33 Vict. c. 41, s. 16.

Sect. 9. — *Borough Rates.*

Borough rates in municipal boroughs. — By the Municipal Corporations Act, 1882, 45 & 46 Vict. c. 50, re-enacting s. 92 of the Municipal Corporations Act, 1835, 5 & 6 Will. 4, c. 76, s. 92, if the borough fund of a municipal corporation be insufficient for all the purposes to which it is applicable, the council "shall order" a borough rate, to make up the deficiency; and by s. 147 of the same act where the vestry of a parish has made or makes, under s. 4 of the Poor Rate Assessment and Collection Act, 1869 (*z*), an order that owners instead of occupiers shall be rated to the poor rate, every such order while in force "shall be deemed to apply to and include rating to the borough rate."

Sect. 10. — *Highway Rates.*

By the General Highway Act, 5 & 6 Will. 4, c. 50 (*a*), highway rates are to be made by the surveyor of highways, and allowed by two justices, and published and collected in the same way as poor rates (*b*). They are to be made in a prescribed form and manner upon *the occupiers* (*c*). Errors in highway rates may be corrected by the surveyor with the consent and approbation of the justices at a special session for the highways (*d*). Persons rated who through poverty are unable to pay may be excused by the justices at such session (*e*). When property, or the owner or occupier in respect thereof, was previous to the passing of this act, *legally exempt from the performance of statute duty*, or from the payment of any composition in lieu thereof, or of highway rate, the said property, and the owners and occupiers

(*z*) 32 & 33 Vict. c. 41, *post*, Appendix A.

(*a*) See also 25 & 26 Vict. c. 61; 26 & 27 Vict. cc. 61, 94; 27 & 28 Vict. c. 101; 2 Burn's Justice, 974 (30th ed. 1869); id. 270—1149.

(*b*) 5 & 6 Will. 4, c. 50, s. 27—34. If not so *published*, it does not follow that the rate is utterly void; Le Feuvre *v.* Miller, 8 E. & B. 321.

(*c*) Sect. 29, and Sched. Form No. 4.

(*d*) Sect. 31.

(*e*) Sect. 32.

thereof, are exempt from the payment of the rate (*f*). For levying and *recovering the rate, the surveyor [*578] has the same powers, remedies, and privileges, as the overseers of the poor of the parish have by law for the recovery of any poor-rate (*g*). In parishes in which the overseers of the poor have power by local acts of parliament to compound with or require composition for poor rates from the landlords of certain houses, tenements, or hereditaments, and, in case of their refusal to compound, to rate such landlords as the occupiers, the surveyor has the same powers, &c., to compound and enforce composition, and, in case of refusal by the landlords, to assess them in the same proportions to the rates authorized to be made by this act, as the overseers of the poor have by such acts for assessing and recovering any rate made for the relief of the poor, or the compositions entered into for the same (*h*). An appeal against any highway rate may be made to the quarter sessions (*i*).

Highways within the district of any urban sanitary authority are usually provided for under the Public Health Act, 1875 (38 & 39 Vict. c. 55, s. 216), by general district rates levied under that act.

SECT. 11. — *General District Rates under Public Health Act.*

By sect. 211 of the Public Health Act, 1875 (38 & 39 Vict. c. 55), "general district rates" are levied on the "occupier of all kinds of property for the time being by law assessable to any rate for the relief of the poor," and are assessed "on the full net annual value of such property ascertained by the valuation list for the time being in force, or if there is none, by the rate for the relief of the poor made next before the making of the assessment," under the act.

Rating of owner instead of occupier. — But the same section provides for the rating of the owner in certain cases as follows: —

(*f*) Sect. 33.
(*g*) Sect. 34.
(*h*) Sect. 30.
(*i*) Sect. 105—108.

"The owner, instead of the occupier, may, at the option of the urban authority, be rated in cases —

Where the rateable value of any premises liable to assessment under this act does not exceed the sum of 10*l.*; or

Where any premises so liable are let to weekly or monthly tenants; or

Where any premises so liable are let in separate apartments, or where the rents become payable or are collected at any shorter period than quarterly:

Provided that in cases where the owner is rated [*579] instead of the *occupier, he shall be assessed on such reduced estimate as the urban authority deems reasonable of the net annual value, not being less than two-thirds nor more than four-fifths of the net annual value; and where such reduced estimate is in respect of tenements whether occupied or unoccupied, then such assessment may be made on one-half of the amount at which such tenements would be liable to be rated if the same were occupied and the rate were levied on the occupiers."

Quarter rating. — The same section (211 of the Public Health Act, 1875) provides that (inter alios) "the occupier of any land used as arable, meadow or pasture ground only, or as woodland, market gardens, or nursery grounds, and the occupier of any land covered with water, shall be assessed in respect of the same in the proportion of one-fourth part only of such net annual value thereof."

Unoccupied premises. — As to unoccupied premises, the same section provides: —"If at the time of making any general district rate any premises in respect of which the rate may be made are unoccupied, such premises shall be included in the rate, but the rate shall not be charged on any person in respect of the same while they continue to be occupied; and if any such premises are afterwards occupied during any part of the period for which the rate was made and before the same has been fully paid, the name of the incoming tenant shall be inserted in the rate, and thereupon so much of the rate as at the commencement of his tenancy may be in proportion to the remainder of the said period shall be col-

lected, recovered and paid in the same manner in all respects as if the premises had been occupied at the time when the rate was made."

Outgoing and incoming tenants. — As to incoming tenants, the same section provides: — "If any owner or occupier assessed or liable to any such rate ceases to be owner or occupier of the premises in respect whereof he is so assessed or liable, before the end of the period for which the rate was made, and before the same is fully paid off, he shall be liable to pay only such part of the rate as may be in proportion to the time during which he continues to be such owner or occupier; and in every such case if any person afterwards become owner or occupier of the premises during part of the said period, he shall pay such part of the rate as may be in proportion to the time during which he continues to be such owner or occupier, and the same shall be recovered in the same manner as if he had been originally assessed or liable."

The same section keeps alive exemptions under local acts, and provides for divisions of districts and assessments accordingly (*k*).

* **Contracts between landlord and tenant.** — Sect. 97 [*580] of the Public Health Act, 1848, which act is entirely repealed by the Act of 1875, provided "that nothing in this act shall alter, interfere with, or affect any lease, contract or agreement which shall have been made or entered into between landlord and tenant *before this act is applied to the district* in which the premises are situate in respect of which the lease, contract or agreement was made." On the same principle, sect. 226 of the Act of 1875 provides that "nothing in this part [i.e. Part VI., which applies to "rating and borrowing powers"] of this act shall alter or affect any lease, contract or agreement made or entered into between the landlord and tenant of any premises."

Expenses of abating nuisance. — Where the landlord executed certain works upon the demised premises in conse-

(*k*) See Lumley's Public Health Act, 1875; and see sect. 320 of the act as to division of expenses between landlord and tenant, under the provisions of any local act before the passing of the Public Health Act, 1872.

quence of a notice from the sanitary authority under section 94 of the Public Health Act, 1875, to abate a nuisance thereon, and in order to prevent proceedings against himself, it was held that "he could not recover the expenses of such works from the tenant upon the tenant's covenant to pay all taxes, rates, charges, assessments and impositions whatsoever" (except land tax and landlord's property tax) charged, &c., "by authority of parliament *or otherwise howsoever*" (*l*). In the subsequent and similar, though in law distinguishable, case of Budd *v.* Marshall (*m*), however, in which the word "duties" occurred in the covenant to pay taxes, the Court of Appeal held that the landlord could recover. But the words "rates, taxes and assessments," do not include a sum assessed upon a landlord as his proportion of the expense of paving a street upon which the demised premises abut, this being a charge imposed upon the owner for the permanent benefit of the property (*n*).

Private improvement rates. — The urban authority have also power, under the Public Health Act, 1875, to make and levy "private improvement rates" upon the occupier (*o*), who may deduct three-fourths, or such proportion of three-fourths of the rate paid by him as his rent bears to the rack-rent (*p*), unless there be some special stipulation in his lease to the contrary (*q*). By sect. 215, "at any time before the expiration of the period for which any private improvement rate is made, the owner or occupier of the premises assessed thereto may redeem the same, by paying to the urban authority the expenses in respect of which the rate was made, or such part thereof as may not have been defrayed by sums already levied in respect of the same."

[*581] * **Water rates.** — Any urban authority may also, under the same act, provide their district with water,

(*l*) Rawlins *v.* Briggs, L. R., 3 C. P. D. 368; 47 L. J., C. P. 487; 27 W. R. 138.

(*m*) L. R., 5 C. P. D. 481; 50 L. J., C. P. 24; 42 L. T. 793; 29 W. R. 148. Brett, L. J., diss., affirming judgment of Grove, J., who had tried the case without a jury (Id. 149).

(*n*) Wilkinson *v.* Collyer, L. R., 13 Q. B. D. 1; 53 L. J., Q. B. 278; 51 L. T. 299; 32 W. R. 614.

(*o*) 38 & 39 Vict. c. 55, s. 213.

(*p*) Sect. 214.

(*q*) Sect. 226, *supra*; and see Smith *v.* Humble, 15 C. B. 321.

and where they supply to any premises "may charge in respect of such supply a water rate to be assessed on the net annual value of the premises" (*r*).

Generally fall on occupier. — With respect to each of the above-mentioned rates it is to be observed that they are to be made and levied *upon the occupier*, who generally has no right to deduct any part thereof from his rent (except about three-fourths of "improvement rates"). But contracts between landlord and tenant as to the payment of rates and taxes are not interfered with (*s*).

Appeal. — The validity of a rate which might be appealed against cannot be questioned in an action, or otherwise than on appeal, unless such rate was wholly *illegal*, and made without jurisdiction (*t*). Any appeal must be entered within a very limited time, and notice of appeal, together with the grounds of appeal, given, and a recognizance with sureties entered into, within the time and in manner in that behalf prescribed (*u*).

Repairs of highways. — The liability to repair a highway *ratione clausuræ* is in the occupier of the land enclosed; not in the owner as owner (*x*). And it seems that such liability does not accrue where either the highway is not immemorial, or where the adjoining land inclosed has not before the inclosure been used for passage (*x*).

Sect. 12. — *Watching and Lighting Rates.*

The act 3 & 4 Will. 4, c. 90, was passed to enable parishes and parts of parishes, *without obtaining any local acts*, but with the consent of the ratepayers (*y*). to watch and light, or watch or light, their own parish or district under the direction of inspectors appointed by the ratepayers, and by means of rates to be raised and levied in like manner as poor

(*r*) Sects. 51, 56 *et seq.* And see 582, *post.*

(*s*) Sect. 226, *supra.*

(*t*) Luton Local Board, app., Davis, resp., 2 E. & E. 678; 29 L. J., M. C. 173.

(*u*) Sect. 268 *et seq.*

(*x*) Reg. *v.* Ramsden, Bart., E., B. & E. 949.

(*y*) Eynsham case, 12 Q. B. 398, n.; Reg. *v.* Dunn, 7 E. & B. 220; 26 L. J., M. C. 74.

rates, not exceeding a certain sum to be fixed in the first year, and not to be exceeded in any subsequent year (*z*). The provisions of this act may be adopted in any parish, or part of a parish, in England or Wales, as to watching and lighting, or watching or lighting (both or either), as may be deemed expedient (*a*). But they are not to interfere [*582] with "An Act for Improving the Police in * and near the Metropolis" (10 Geo. 4, c. 44); nor to extend to any parish or place already regulated by or under the provisions of any act of parliament for all or any of the purposes hereinbefore provided for; or to interfere with the powers which any corporate body may have with respect to watching and lighting (*b*); nor to extend to any part of a parish so regulated (*c*). But the powers of this act may be adopted in any parish so far as the same relate to lighting, although such parish shall be watched (*d*).

In any district where the Public Health Act, 1875, is in force, in which the 3 & 4 Will. 4, c. 90, has been adopted, such last-mentioned act is superseded (*e*).

Rates on occupiers. — Rates made under 3 & 4 Will. 4, c. 90, or under local acts as to paving, watching, lighting, &c., generally fall upon the occupier, who has no right to deduct them from his rent. But sometimes the burthen is thrown upon the landlord. Thus by 57 Geo. 3, c. xxix, for regulating the pavement of London, Westminster and Southwark, and the parishes of St. Marylebone and St. Pancras, the paving rates are directed to be paid by the landlord in certain cases.

SECT. 13. — *Water Rates.*

Payable by tenant. — Water rates are always payable by the tenant or occupier in the absence of an express stipulation to the contrary, for he has the use and enjoyment of the water supplied.

(*z*) Beechey *v.* Quintery, 10 M. & W. 65.
(*a*) Sects. 71, 73.
(*b*) Sect. 72.
(*c*) Sect. 73.
(*d*) See 3 Burn's Justice, 364—389 (30th ed. 1869).
(*e*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 163.

By landlords of small tenements. — But by the Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), s. 72, the owners of dwelling-houses, the annual value of which does not exceed 10*l.*, are made liable to the payment of water rates instead of the occupiers; "and the person receiving the rents of any such house or tenement as aforesaid from the occupier thereof on his own account, or as agent or receiver for any person interested therein, shall be deemed the owner of such house or tenement." Sect. 73 gives power to owners of tenements, where the occupation is under a lease or agreement made *prior to the passing of the special act* (*f*), to recover such payments from the occupiers in the same manner as arrears of rent may be recovered.

Water rate under Public Health Act. — By sects. 51—66 of the Public Health Act, 1875 (38 & 39 Vict. c. 55), local authorities within the meaning of that act may supply their districts with water; and for this purpose there are incorporated *with the Public Health Act, 1875, the [*583] Waterworks Clauses Act, 1863, and the provisions (inter alia) of the Waterworks Clauses Act, 1847, which relate to the "payment and recovery of the water rates." And it is provided by sect. 57 of the Public Health Act, 1875, that "any rent for pipe and works paid by an occupier" under sect. 44 (*g*) of the Waterworks Clauses Act, 1847, "may be deducted by him from any rent from time to time due from him to such owner."

Water rate included in term "rates."—It has been held that a water rate for water separately supplied to a shop and basement and paid for by the tenant was included in the terms "all rates and taxes chargeable in respect of" the shop and basement and three rooms on a third floor, which the lessor thereof covenanted to pay (*h*).

(*f*) The local act which incorporates the general act above mentioned.

(*g*) This section applies to houses of not exceeding ten pounds annual value. To such houses, by virtue of the same section as amended by sect. 57 of the Public Health Act, 1875, communication pipes must be laid down at the request of owners *or* occupiers.

(*h*) Direct Spanish Telegraph Co. *v.* Shepperd, L. R., 13 Q. B. D. 202; 53 L. J., Q. B. 420; 51 L. T. 124; 32 W. R. 217, *per* Hawkins and Smith, JJ., who refused leave to appeal.

Water rate in metropolis. — In the metropolis the water rate is a percentage on the rateable value of the premises supplied with the water (*i*).

SECT. 14. — *Gas Rates.*

In the metropolis. — Gas rates are always payable by the tenant, in the absence of any express stipulation to the contrary. The supply of gas to the metropolis is regulated by 23 & 24 Vict. c. 125, which, however (by sect. 5), except *nine* gas companies in the suburbs. The act itself must be referred to for details (*k*).

Supply of gas to incoming tenant. — But, by sect. 39, "in case any consumer leaves the premises where gas was supplied to him, without paying to the gas company the rate or meter rent due from him, the gas company shall not require from the next tenant of the premises payment of the arrears so left unpaid, unless the incoming tenant agreed with [*584] the defaulting consumer to pay the arrears; but *the gas company shall, notwithstanding any such arrears, in the absence of collusion between the outgoing and incoming tenant, supply gas to the incoming tenant as required by this act, on being required by him so to do."

Elsewhere than in the metropolis. — The supply of gas elsewhere than in the metropolis is regulated by the Gasworks

(*i*) Waterworks Clauses Act Amendment Act, 1885 (48 & 49 Vict. c. 34).

(*k*) See also Great Central Gas Consumers Co. *v.* Clark, 11 C. B., N. S. 814; 11 W. R. 123; Imperial Gaslight and Coke Co. *v.* West London Junction Gas Co., 14 W. R. 1019; 15 L. T. 66. Taking up a pavement, and digging trenches in the roadway and footway of a public thoroughfare, in order to lay down service pipes for the supply of gas from mains to private houses, are not acts that can be justified at common law, as done in the exercise of the right of every occupier of a house to make such a temporary obstruction of the highway as may be necessarily incidental to the enjoyment of the property; and a householder who authorizes such acts, and they who do them, having no parliamentary powers for the purpose, are liable to be indicted for a nuisance. (Reg. *v.* Longlar Gas Co., 29 L. J., M. C. 118; 6 Jur., N. S. 601.) But the High Court will not restrain such acts by injunction, even as between rival gas companies. (Att.-Gen. *v.* Sheffield Gas Co., 3 De Gex, M. & G. 304; Att.-Gen. *v.* Cambridge Consumers Gas Co., L. R., 4 Ch. 71.)

Clauses Acts, 1847 and 1871, and by the special acts of each company. By sect. 39 of the Gasworks Clauses Act, 1871 (34 & 35 Vict. c. 41), "in case any consumer of gas" leaves the premises where the gas has been supplied to him "without paying the gas rent or meter rent due from him," the company "shall not be entitled to require from the next tenant the payment of the arrears left by the former tenant, unless such incoming tenant has undertaken with the former tenant to pay or exonerate him from the payment of such arrears."

Sect. 15. — *The Rating Act*, 1874.

Commencement of act. — The more important special sections of the Rating Act, 1874, have already been set forth (*l*). It may be added here, that the act, by sect. 11, came into operation (except for certain valuing purposes, for which it came into operation on the 7th August, 1874) on the 6th April, 1875.

Deduction of rates. — By sect. 9, "where any occupier, lessee, licensee, grantee, or other person is authorized by this act to deduct any rate or sum in respect of a rate from any rent, royalty, or dues payable by him, then — (1). Any payment so authorized to be deducted shall be a good discharge for such amount of rent, royalty, or dues as is equal to the amount of such payment, and shall be allowed accordingly. (2). Any payment so authorized to be deducted may be recovered as an ordinary debt from the person to whom the rent, royalty, or dues may be payable. (3). The person receiving the rent, royalty, or dues shall have the same right of appeal and objection with reference to the rate and to the valuation of the hereditaments in respect of which the rate is payable as he would have if he were the occupier of such hereditaments."

Liability of property to local rates. — And by sect. 10, "after the commencement of this act, the hereditaments to which the poor rate acts are extended by this act, and which are thus

(*l*) *Ante*, 573.

made rateable to the relief of the poor, shall be rateable to all local rates in like manner as if the poor rate acts had extended to such hereditaments."

[*585] *SECT. 16. — *Tithe Rent-charge.*

The incidence of the Tithe rent-charge is regulated by the Tithe Commutation Act, 1836 (6 & 7 Will. 4, c. 71), and its amending acts (*m*), the effect of this legislation being to impose the charge upon the land alone, and to impose no personal liability to the tithe-owner on either landlord or tenant (*n*), but at the same time to allow the tenant to deduct the rent-charge from his rent (*o*).

Deduction from rent. — By sect. 80 of 6 & 7 Will. 4, c. 71, "every tenant or occupier who shall occupy any lands by any lease or agreement made subsequent to such commutation [of tithes], and who shall pay any such rent-charge, shall be entitled to deduct the same from the rent payable by him to his landlord, and shall be allowed the same in account with the said landlord."

Distress on land. — By sect. 81 of the same act, "in case the said rent-charge shall at any time be in arrear and unpaid for the space of twenty-one days next after any half-yearly day of payment, it shall be lawful for the person entitled to the same, after having given or left ten days' notice in writing at the usual or last-known residence of the tenant in possession (*p*), to distrain upon the lands liable to the payment thereof, or any part thereof, for all arrears of the said rent-charge, and to dispose of the distress when taken, and otherwise to act and demean himself in relation thereto as any landlord may for arrears of rent reserved on a common lease for years; provided that not more than two years' arrears shall at any time be recoverable by distress."

(*m*) See Chit. Stat. (4th ed.), tit. Tithes.

(*n*) See section 67 of 6 & 7 Will. 4, c. 71; Griffenhoofe *v.* Daubuz, 24 L. J., Q. B. 20; 5 E. & B. 746.

(*o*) For cases as to construction of covenants, see *ante*, 555.

(*p*) Or if no person in occupation, then by affixing the notice in some conspicuous place on the land; 5 & 6 Vict. c. 54, s. 17.

Extent of lands liable to distress. — And by sect. 85, "whenever any rent-charge payable under the provisions of this act shall be in arrear, notwithstanding any apportionment which may have been made of any such rent-charge, every part of the land situate in the parish in which such rent-charge shall so be in arrear, and which shall be occupied by the same person who shall be the occupier of the lands on which such rent-charge so in arrear shall have been charged, whether such land shall be occupied by the person occupying the same as the owner thereof, or as tenant thereof, holding under the same landlord under whom he occupies the land on which such rent-charge so in arrear shall have been charged, shall be liable to be distrained upon or entered upon as aforesaid for the purpose of satisfying any arrears of such rent-charge, whether chargeable on the lands on which such distress is taken or such entry made, or upon any other part of the lands so occupied or holden: *provided [*586] always, that no land shall be liable to be distrained or entered upon for the purpose of satisfying any such rent-charges charged upon lands which shall have been washed away by the sea, or otherwise destroyed by any natural casualty."

Payment where out-going tenant leaves tithe rent-charge unpaid. — By 14 & 15 Vict. c. 25, s. 4, "if any occupying tenant of land shall quit, leaving unpaid any tithe rent-charge for or charged upon such land, which he was by the terms of his tenancy or holding legally or equitably liable to pay, and the tithe-owner shall give or have given notice of proceeding by distress upon the land for recovery thereof, it shall be lawful for the landlord or the succeeding tenant or occupier to pay such tithe rent-charge, and any expenses incident thereto, and to recover the amount or sum of money which he may so pay over against such first-named tenant or occupier, or his legal representatives, in the same manner as if the same were a debt by simple contract due from such first-named tenant or occupier to the landlord or tenant making such payment."

* CHAPTER XVI.

OBLIGATIONS WITH RESPECT TO THE PRESERVATION OF THE DEMISED PREMISES.

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SECT. 1. — *Express Contract to Repair, &c.*

(a) *By Tenant.*

Express contract to repair, &c. — Leases of houses, &c., usually contain a covenant by the lessee to repair and keep in repair the demised premises during the term : [1] also an-

[1] **Lessee's express covenant to repair.** — If lessee covenant to repair (without an express limitation), he will be obliged to rebuild if building is burned. Phillips *v.* Stevens, 16 Mass. 238; Allen *v.* Culver, 3 Denio (N. Y.) 284, 294 (*per* Jewett, J.). He will also be liable to the lessor for the expenses of repairs ordered by the board of health. Hull *v.* Burns, 17 Abb. N. C. (N. Y.) 317.

It has been held that if he covenant to make improvements he will be entitled to the whole term in which to make them. Chipman *v.* Emeric, 5 Cal. 49 (to build a wharf).

A tenant's ordinary covenant to repair and deliver up premises in good

other distinct covenant to repair specific defects within a certain number of months (usually three) after written notice thereof (*a*): also to paint the outside and inside wood and ironwork in a certain manner at stated times: and a covenant to leave the premises in proper repair at the end or other sooner determination of the term, besides other covenants as agreed: after which usually follows a proviso for re-entry on breach of any of the covenants (*b*). Prior to the Conveyancing Act, 1881, especially where a premium is given, and in building leases, it was of importance to qualify this proviso for re-entry, and to limit it to breaches occasioning a specified amount of damage to the reversion and inheritance (*c*), or to breaches after a certain notice in writing (*d*), or to cases where damages in an action * for [*588] the breach had not been paid: but it was commonly made to apply to any breach of covenant whatever, without due consideration on behalf of the lessee as to the possible very serious consequences (*e*).

The 14th section of the Conveyancing Act, however (ante, 328), by the liberality of its provisions for relief against forfeiture, has so greatly mitigated these consequences as to render such qualifications unnecessary.

Breaches before execution of the lease. — A lessee is not liable for breaches of covenant to repair, committed *before the execution of the lease* by the lessor, although subsequent

(*a*) Baylis *v.* Le Gros, 4 C. B., N. S. 537; Few *v.* Perkins, L. R., 2 Ex. 92; 36 L. J., Ex. 54.

(*b*) See forms of Leases, *post*, Appendix B.

(*c*) See Doe *d.* Earl of Darlington *v.* Bond, 5 B. & C. 855; Cole Ejec. 427.

(*d*) See Doe *d.* Rankin *v.* Brindley, 4 B. & Ad. 84.

(*e*) See Hodgkinson *v.* Crowe, L. R., 10 Ch. 622; and 122, *ante*.

condition, is not sufficient to control the tenant's right to remove fixtures. *Per* Chatterton, V. C., in Cosby *v.* Shaw, 19 L. R. Ir. (Ch. D.) 307. If lessee covenant to deliver up the premises with the improvements to be made, he cannot remove fixtures. Same *v.* Same. If he covenant to make all necessary repairs to a gate, he will be bound to replace the gate if it is removed by some unknown third party. Beach *v.* Crain, 2 N. Y. 86.

It has been held that a covenant to repair, in an oral lease, was void by the Statute of Frauds. O'Leary *v.* Delaney, 63 Me. 584, 586; and in McMullen *v.* Riley, 6 Gray (Mass.) 500, a contract in oral lease to pay lessor the expense of a fixture was held non-enforcible. In that case, however, the lessee did not occupy.

to the day from which the habendum states the commencement of term (*f*). An agreement made on the 31st of August, to take premises from the 29th of September following, the landlord agreeing to take back the fixtures at the end of the term, provided "they are in as good a condition as they *now* are," and the tenant agreeing to leave the premises "in the same state as they *now* are," there being at the time another tenant in possession, and the new tenant not taking possession until the 29th of September, refers to the state of the premises on the 29th of September (*g*).

Covenant to repair forthwith. — A covenant "forthwith" to put premises into repair must receive a reasonable construction, and is not limited to any specific time: therefore it is for the jury to say, upon the evidence, whether the defendant has done what he reasonably ought in performance of it (*h*). "There is no doubt that the word *forthwith* means with all reasonable celerity" (*i*). It does not mean "immediately" (*k*).

Covenant to keep in repair during the term. — A lessee who has covenanted to repair and keep in repair the demised premises during the term must have them in repair *at all times during the term;* and if they are at any time out of repair, he commits a breach of covenant (*l*), for which the lessor or his assigns may, even during the term, recover damages commensurate with the injury thereby done to the reversion (*m*), or may, subject to sect. 14 of the Conveyancing Act, maintain an action of ejectment, if there be a proviso for re-entry applicable to such covenant. On a covenant to keep premises in repair, it is a breach to pull them down either wholly or partially, even so far as to open doors in a wall; and it is a breach for which the lessor may sue and recover substantial damages during the term: nor is it any equitable defence that it was done with the "consent and

(*f*) Shaw *v.* Kay, 1 Exch. 412.

(*g*) White *v.* Nicholson, 4 M. & G. 95.

(*h*) Doe *d.* Pitman *v.* Sutton, 9 C. & P. 706.

(*i*) Burgess *v.* Boetefeur, 7 M. & G. 494.

(*k*) Roberts *v.* Brett, 11 H. L. Cas. 337; 34 L. J., Ch. 241.

(*l*) Luxmore *v.* Robson, 1 B. & A. 584.

(*m*) Smith *v.* Peat, 9 Exch. 161. See *post*, Sect. 3 (b).

acquiescence" of the lessor, unless it appears that it was with his previous consent (*n*). Where there is a demise for *seven years, and thenceforth from year to year, the covenants to repair, &c., continue in force after the expiration of the seven years (*o*). [*589]

General covenant to repair. — A general covenant to repair is satisfied by the lessee keeping the premises in *substantial repair:* a literal performance of the covenant is not to be required (*p*).

Old premises. — Where a lessee covenants to keep *old* premises in repair, he is not liable for such dilapidations as result from the natural operation of time and the elements (*q*); and with a view to determine the relative sufficiency of repair, the jury may consider whether the house was new or old at the time of the demise (*r*); and what was its *then* state of repair and condition *generally* (*s*), not in detail (*t*).

"Keep" in repair. — A covenant to *keep* old premises in repair and to leave them in repair at the end of the term, means that the lessee will, if necessary, *put them into repair;* for otherwise they cannot be kept or left in repair pursuant to the covenant (*u*). Their age, and class, and general condition, must be taken into consideration, but not particular defects or want of repair at the time the term commenced (*u*).

Sublease. — A covenant to repair contained in a sublease, though in the same words as the covenant in the original lease (except as to names), has not the same legal effect and meaning, because of the different ages and conditions of the premises at the respective times of the lease and sublease (*x*). "It is perfectly well settled," observed Parke, B., in Walker *v.* Hatton, "that a general covenant to repair must be con-

(*n*) Gange *v.* Lockwood, 2 F. & F. 115; Doe *d.* Vickery *v.* Jackson, 2 Stark. R. 293.

(*o*) Brown *v.* Trumper, 26 Beav. 11.

(*p*) Harris *v.* Jones, 1 Moo. & R. 173.

(*q*) Gutteridge *v.* Munyard, 1 Moo. & R. 334.

(*r*) Stanley *v.* Towgood, 3 Bing. N. C. 4.

(*s*) Burdett *v.* Withers, 7 A. & E. 136.

(*t*) Mantz *v.* Goring, 4 Bing. N. C. 451; Young *v.* Mantz, 6 Scott, 277, Belcher *v.* M'Intosh, 8 C. & P. 720; 2 Moo. & R. 186; Woolcock *v.* Dew, 1 F. & F. 337.

(*u*) Payne *v.* Haine, 16 M. & W. 541; Easton *v.* Pratt, 2 H. & C. 676; 33 L. J., Ex. 233; Haldane *v.* Newcomb, 12 W. R. 135; and see Schroder *v.* Ward, 13 C. B., N. S. 410.

(*x*) Walker *v.* Hatton, 10 M. & W. 249; 2 Dowl., N. S. 263.

strued to have reference to the condition of the premises at the time when the covenant begins to operate" (*y*).

Cases as to construction of covenants to repair. — A covenant to repair the buildings demised and to rebuild them if necessary, compels the tenant always during the term to keep them in good repair, and a deduction in damages for their age has been disallowed (*z*). Where a tenant agrees "to put the premises in habitable repair," he is to put them in a better state than that in which he found them, and into a state reasonably fit for the occupation of the class of persons likely to inhabit them (*a*). A tenant under a covenant to repair is liable for repairs only, and not for the extra expense of laying a new floor on an improved plan (*b*). Breaking a doorway * through the wall of a demised house into an adjoining house is a breach of the general covenant to keep in repair, and so is the continuing of it so broken (*c*), but enlargement of windows, opening external doors, and taking down partitions, are no breach of a covenant to repair and keep in repair a dwelling-house, together with all such buildings, *improvements and additions* as should be executed, set up or made by the lessee; for such a covenant evidently contemplates such alterations, and allows them to be made (*d*). A covenant by a lessee, that he will, during the term, repair, uphold, support, maintain and sustain the brick walls to the demised premises belonging, is broken if he pull down a brick wall which divides the court-yard at the front of the house from another yard at the side of the house (*e*). A covenant to repair the external parts of the demised house comprises the partition wall between it and an adjoining house (*f*). Where the tenant of a farm covenanted "well and substantially" to repair and "keep in good substantial repair," and so "well and substantially repaired"

[*590]

(*y*) *Supra* (*x*).

(*z*) Worcester School Trustees *v.* Rowlands, 9 C. & P. 734.

(*a*) Belcher *v.* M'Intosh, 8 C. & P. 720; 2 Moo. & R. 186, 189.

(*b*) Saward *v.* Leggatt, 7 C. & P. 613.

(*c*) Doe *d.* Vickery *v.* Jackson, 2 Stark. 293; Gange *v.* Lockwood, 2 F. & F. 115; Borgnis *v.* Edwards, Id. 111.

(*d*) Doe *d.* Dalton *v.* Jones, 4 B. & Ad. 126; Cole Ejec. 425.

(*e*) Doe *d.* Wetherell *v.* Bird, 2 N. & M. 285; 6 C. & P. 195.

(*f*) Green *v.* Eales, 2 Q. B. 225.

to yield up at the end of the term, it was held that the tenant was bound to give up the premises in as good a state of repair as when he took possession, and that they must be inferred to have been then in a tenantable state (*g*).

Mill-wheel. — On a letting of a farm and mill a contract by the tenant to keep "the messuages and buildings" in repair obliges him to keep the mill-wheel in repair (*h*).

Glass, &c. — A covenant to leave the premises at the end of the term sufficiently maintained, repaired, paled and fenced, was held to have been broken when the pavement was out of repair and the glass in the windows broken (*i*).

Painting. — The painting of a house is usually provided for by the express terms of a lease, but it would seem that some degree of painting is implied in the mere term "repair." It has been ruled, for instance, that under a covenant to "substantially repair, uphold, and maintain" a house, he is bound to keep up the inside painting (*k*); but it has been also ruled, on a covenant, as often as necessary well and sufficiently to repair, uphold, sustain, paint, glaze, cleanse and scour, and keep and leave the premises in such repair, reasonable wear and tear excepted, that the tenant, if he has repaired within a reasonable time before leaving, is only bound, in addition to the repair of actual dilapidations, to clean the old paint, &c., and not to repaint (*l*).

Questions of this kind will often be more questions of fact than of law; but if the painting be left to be included in the general term * "repair," the only legal obli- [*591] gation would seem to be to paint just as much as is necessary to keep the premises from actual deterioration.

Substantial damages, though buildings intended to be pulled down. — Although buildings are intended to be immediately pulled down and rebuilt by an incoming tenant, the landlord may recover more than nominal damages against the outgoing tenant for not performing his covenant to keep and leave

(*g*) Brown *v.* Trumper, 26 Beav. 11.
(*h*) Openshaw *v.* Evans, 50 L.T.156.
(*i*) Ryot *v.* Lady St. John, Cro. Jac. 329. 289.
(*k*) Monk *v.* Noyes, 1 C. & P. 265.
(*l*) Scales *v.* Lawrence, 2 F. & F.

them in good repair (*m*). This was held in Rawlings *v.* Morgan (*m*), in which the question of measure of damages, how far more than nominal, was not argued, but it would seem that the landlord is entitled to recover the exact amount at which the dilapidations may be assessed at, on the ground that a right of action for such damages accrued at the end of the tenancy, and that nothing done afterwards could affect it (*n*).

Buildings erected during the term. — General covenants to repair and leave in repair, extend to all buildings erected during the term (*o*). But where, in a lease of land with buildings on it, the covenant was to repair *the buildings demised*, and to rebuild *them* if necessary, and to keep the fences in repair; it was held, that the tenant was not bound to keep in repair additional buildings erected on other parts of the land (*p*). In White *v.* Wakley, under a lease of a farm, the tenant was bound to keep in repair the buildings to be erected thereon during the term: the tenant, with the permission of the landlord, who was lord of the manor, built a house on the waste adjoining the farm, and enjoyed it with the farm. It was held that the tenant was also under an obligation to keep the house in repair (*q*). A covenant to yield up in repair all buildings and improvements erected during the term, has been held to be broken by the removal of a veranda, the lower part of which was attached to posts fixed in the ground (*r*); but if the buildings erected during the term be solely for the purpose of trade and manufacture, and rest merely upon blocks or pattens, the covenant to

(*m*) Rawlings *v.* Morgan, 18 C. B., N. S. 776; 34 L. J., C. P. 185; 11 Jur., N. S. 564; 12 L. T. 348; 13 W. R. 746; followed with approval by Lopes, J., in Inderwick *v.* Leech, 1 C. & E. 412, in which case the landlord himself reconstructed.

(*n*) See *per* Keating, J., in Rawlings *v.* Morgan, and *per* Lopes, J., in Inderwick *v.* Leech, *ubi supra*.

(*o*) 1 Esp. N. P. 277; Dowse *v.* Cale, 2 Ventr. 126; Dowse *v.* Earle, 3 Lev. 264; Bac. Abr. *Covenant* (F). See as to construction of express covenant to repair buildings "to be erected," Hudson *v.* Williams, 39 L. T. 632.

(*p*) Worcester School Trustees *v.* Rowlands, 9 C. & P. 734; Cornish *v.* Cleife, 3 H. & C. 446; 34 L. J., Ex. 19.

(*q*) *In re* Newbery, White *v.* Wakley, 26 Beav. 17; 28 L. J., Ch. 77.

(*r*) Penry *v.* Brown, 2 Stark. R. 403.

yield up in repair all buildings to be erected during the term does not extend to them (*s*), although it would be otherwise if they had been let into the soil: on this point, however, many distinctions in favour of trade have been taken (*t*). Where a tenant erects fixtures for the purpose of his trade on the demised premises, and afterwards takes a new lease to *commence at the expiration of the former one, [*592] and the latter lease contains a general covenant to repair, such lessee is bound to repair such fixtures, unless it can be satisfactorily shown that they were not intended to pass under the general words of the second lease (*u*).

Repair, in case of fire. — If a tenant covenant to repair and keep in repair the demised premises during the term (not saying "damage by fire excepted," or to that effect (*x*)), he must rebuild them if burnt down by accident, negligence, or otherwise (*y*), or if destroyed by tempest or earthquake. He must also continue to pay his rent in the same manner as if no fire had happened (*z*), and it has been said to make no difference that the landlord has received insurance money (*a*). Even where the tenant's covenant to repair, &c., contains an express exception of damage by fire and tempest, whereby he is exonerated from rebuilding, it seems that this exception casts no obligation upon the landlord to rebuild or repair in the event of loss or damage by fire or tempest (*b*), and that only an express covenant by the landlord to repair will cast such an obligation upon the landlord. A covenant for quiet

(*s*) Naylor *v.* Collinge, 1 Taunt. 19.

(*t*) See *post*, Sect. 8, "Fixtures."

(*u*) Thresher *v.* East London Waterworks Co., 2 B. & C. 608.

(*x*) As to the construction of such an exception, see Bennett *v.* Ireland, E., B. & E. 326; 28 L. J., Q. B. 48.

(*y*) Bullock *v.* Dommitt, 2 Chit. R. 608; 6 T. R. 650; 2 Wms. Saund. 422; Earl of Chesterfield *v.* Duke of Bolton, Comyn, 267; Poole *v.* Archer, Skin. 210; Digby *v.* Atkinson, 4 Camp. 275; Clarke *v.* Glasgow Assurance Co., 1 Macq. H. L. Cas. 668. See also Manchester Bonded Warehouse Co. *v.* Carr, L. R., 5 C. P. D. 507; 49 L. J., C. P. 809; 43 L. T. 476; 29 W. R. 354.

(*z*) Belfour *v.* Weston, 1 T. R. 310; Baker *v.* Holtzapffell, 4 Taunt. 45; Holtzapffell *v.* Baker, 18 Ves. 118; Izon *v.* Gorton, 5 Bing. N. C. 501; Parker *v.* Gibbins, 1 Q. B. 421; Lofft *v.* Dennis, 1 E. & E. 474; Smith L. & T. 276 (2nd ed.).

(*a*) Leeds *v.* Cheetham, 1 Sim. 146; Lofft *v.* Dennis, 1 E. & E. 474; 28 L. J., Q. B. 168. But see 402, *ante*.

(*b*) Weigall *v.* Waters, 6 T. R. 488.

enjoyment during the term is not sufficient (*c*). Where a farmhouse was burnt by accident, it was held by the House of Lords, reversing a judgment of the Court of Session in Scotland, that the landlord was not bound to rebuild (*d*). If there be a covenant by the tenant to keep the premises in repair, and also a covenant to insure them for a specific amount against fire, on their being burnt down, the tenant's liability on the former covenant is not limited to the amount to be insured under the latter covenant (*e*).

Exemption from liability for fire by building act. — The 86th section of the Old Building Act (14 Geo. 3, c. 78) provides that no action shall be maintained against any person in whose house, chamber, stable, barn, or other building, or on whose estate, any fire shall *accidentally begin*, nor shall any recompense be made by such person for any damage suffered thereby: provided, "that no contract or agreement made between landlord and tenant shall be hereby defeated or made void" (*f*).

[*593] * **Covenant to rebuild.** — Where a lessee in a lease of three houses covenanted to pull them down, and rebuild three others, and that he would repair the houses so agreed to be built, *and also that he would repair the demised premises*, and leave the said premises in repair; and he pulled down the three and built four in their stead; it was held, that though he was obliged to build only three houses, yet he was bound to deliver up all in repair; the last covenant being general, and not confined, as the former, to the houses agreed to be built (*g*). Where, however, in a lease of four houses for 99 years, the lessee covenanted within two years to put them in good repair, and keep them in repair during the term, and further, within the first fifty years of the term, to take down the houses "as occasion may require," and in the place thereof to erect four new brick houses: the court intimated that, if within the fifty years the houses should be so repaired as to make them completely

(*c*) Brown *v.* Quilter, 2 Ambler, 619; Bayne *v.* Walker, 3 Dow, 233.
(*d*) Bayne *v.* Walker, *supra*.
(*e*) Digby *v.* Atkinson, 4 Camp. 275.
(*f*) As to the construction of this section, see *post*, Chap. XVII., Sect. 1.
(*g*) Dowse *v.* Earle, 3 Lev. 264; Dowse *v.* Cale, 2 Ventr. 126.

and substantially as good as new houses, the "occasion" on which the new houses were to be built did not arise (*h*). A lease was granted of a piece of land with two unfinished houses thereon, and the lessee covenanted to complete them within two months, and to keep them in repair during the term, there being a proviso for re-entry on breach of the covenant. The two houses were never finished, and long after the expiration of the two months they were much dilapidated. It was held, that a person to whom the reversion was assigned long after the expiration of the two months might maintain ejectment for the subsequent non-repair (*i*).

Covenant to repair after notice. — The covenant to repair generally, and the covenant to repair within three months after notice (*k*), are generally held to be distinct and independent covenants (*l*); but if they immediately follow in such a manner, that they must be joined to make the sentence complete, they are construed as one entire covenant, and the latter part respecting notice is held to qualify the former (*m*), as where there is a covenant to repair at all times, when, where and as often as occasion shall require, and, at the farthest, within three months after notice of want of reparation (*m*).

Suspension of notice. — And where a notice to repair has been given, and the lessee meets it by an offer to sell which leads to negotiation, the effect is to suspend the notice until the negotiation is broken off (*n*).

* **Conditional or qualified covenants to repair, &c.** — [*594] Where a lessee covenanted that *from and after the amendment and repair* of the demised messuages, &c., by the lessor he would repair and sustain them during the term, and at the end thereof leave them well and sufficiently

(*h*) Evelyn *v.* Raddish, 7 Taunt. 411; Holt, 543.

(*i*) Bennett *v.* Herring, 3 C. B., N. S. 370.

(*k*) See forms of such notice, Appendix C., Sects. 13, 14, *post*.

(*l*) Baylis *v.* Le Gros, 4 C. B., N. S. 537; Roe *d.* Goatley *v.* Paine, 2 Camp. 520; Few *v.* Perkins, L. R., 2 Ex. 92; 36 L. J., Ex. 54; Doe *d.* Morecroft *v.* Menx, 4 B. & C. 606.

(*m*) Horsefall *v.* Testar, 7 Taunt. 385.

(*n*) Hughes *v.* Metropolitan R. Co., 45 L. J., C. P. 578; L. R., 1 C. P. Div. 120 (C. A.); affirmed by House of Lords, L. R., 2 App. Cas. 439; 46 L. J., C. P. 583; 36 L. T. 932; 25 W. R. 680.

repaired, and the lessor sued him for non-repair of a dove-house, parcel of the demised premises, which at the commencement of the term was in good and sufficient repair, it was held, after verdict for the plaintiff, that the defendant's covenant was conditional only, and that no action could be maintained against him for the alleged breach, the plaintiff not having first amended and repaired the premises pursuant to the lease (*o*). So where a lessee agrees to keep in repair the messuages, buildings and premises demised, *the same being first put into repair by the lessor*, the latter words create a covenant on the part of the lessor to do all such repairs (*p*), and also a condition precedent; and, until the lessor has put all the demised premises into repair, the lessee is not liable for the non-repair of any part (*q*). So where the tenant covenants to repair, the landlord "finding, allowing and assigning timber sufficient" for the reparations; the landlord cannot maintain an action against the tenant for breach of such covenant to repair, without alleging that he did find, allow and assign sufficient timber (*r*). So where a tenant covenanted to repair and keep in repair the buildings on the demised premises, "being allowed" a certain class of timber; it was held, that in order to create an obligation on the tenant to repair, the landlord must supply, or at all events be ready and willing to supply, such timber (*s*). But where, in a lease for lives, the lessee covenanted that he "would from time to time, and at all times, during the estate thereby granted, at his own proper costs and charges, well and sufficiently repair, amend, maintain, uphold and keep all and singular the demised premises in all manner of needful and necessary reparations whatsoever, *having or taking* in and upon the premises competent and sufficient house-bote, hedge-bote, fire-bote, plough-bote and gate-bote for the doing thereof, without committing any waste or spoil:" in an action by the lessor for not repairing, it was held, that the

(*o*) Slater *v.* Stone, Cro. Jac. 645.

(*p*) Cannock *v.* Jones, 3 Exch. 233; 5 Id. 713.

(*q*) Neale *v.* Ratcliff, 15 Q. B. 916; 20 L. J., Q. B. 130; Coward *v.* Gregory, L. R., 2 C. P. 153, 172; 36 L. J., C. P. 1.

(*r*) Thomas *v.* Cadwallader, Willes, 496; cited 1 E. & E. 487; Smith L. & T. 272, 273 (2nd ed.).

(*s*) Martyn *v.* Clue, 18 Q. B. 661.

lessee's covenant to repair was absolute, and that the words "having or taking, &c.," "without committing waste or spoil" did not amount to a condition precedent that there should be a sufficient supply of that kind of timber on the premises, but only to a license to the tenant to take it, if there were, for repairs, even if made necessary by his own default, without being liable for waste (*t*). Where a lessee covenants to complete the buildings "under *the direction and to the satisfaction of the sur- [*595] veyor" of the lessor, the appointment of such surveyor is a condition precedent to the performance by the lessee of his covenant to complete the buildings (*u*).

Compulsory taking under Lands Clauses Acts. —When a company or corporation gives notice to the tenant that they are willing to treat for the purchase of his interest under the Lands Clauses Consolidation Act, 1845, the tenant is not thereby freed from his covenant to repair, but must continue the performance of such covenants until a conveyance of the demised premises to the company be executed (*x*).

(b) *By landlord.*

Liability of landlord on express covenants to repair, &c. — A landlord may of course take upon himself to do all or any of the repairs during the term, by an express covenant or promise to that effect in the lease or agreement (*y*)[1]; but in the

(*t*) Dean and C. of Bristol *v.* Jones, 1 E. & E. 484; 28 L. J., Q. B. 201.

(*u*) Hunt *v.* Bishop, 8 Exch. 675; 22 L. J., Ex. 337; Hunt *v.* Remnant, 9 Exch. 635; 23 L. J., Ex. 135; Coombe *v.* Greene, 11 M. & W. 480; 2 Dowl., N. S. 1023; but see Cannock *v.* Jones, 3 Exch. 233; 5 Id. 713.

(*x*) Mills *v.* East London Union, L. R., 8 C. P. 79; 42 L. J., C. P. 46.

(*y*) Neale *v.* Ratcliff, 15 Q. B. 916; 20 L. J., Q. B. 130; Cannock *v.* Jones, 3 Exch. 233; 5 Id. 713; Coward *v.* Gregory, L. R., 2 C. P. 153; 36 L. J., C. P. 1; Bird *v.* Elwes, L. R., 3 Ex. 225; 37 L. J., Ex. 91.

[1] **Lessor's express covenant to repair.** — If lessor fail to keep his express covenant to repair, he will be liable to the lessee in an action of covenant, or other similar action, for damages. Edwards *v.* Gale, 52 Me. 360; Leavitt *v.* Fletcher, 10 Allen (Mass.) 119; Royce *v.* Guggenheim, 106 Mass. 201, 202, 203 (*per* Gray, J.).

Under the code practice, damages for failure to repair may be counterclaimed. Myers *v.* Burns, 35 N. Y. 269; and see *ante*, ch. 13, sec. 1, note.

absence of any such stipulation he is not liable to do any repairs whatever (*z*)[1]. Whatever he agrees to do in this

(*z*) *Post*, Sect. 2 (b); Arden *v.* Pullen, 10 M. & W. 321; Gandy, 2 E. & B. 845; Lofft *v.* Dennis, 1 E. & E. 474; 28 L. J., Q. B. 168.

"Defences in suits for rent," and in some states may be recouped, while in still other states the lessee's only remedy is by an independent action.

Damages recoverable for the failure to repair, or to execute any stipulated improvements are (ordinarily), the difference between the value of the use of the premises with and without the repairs. McEwen *v.* Dillon, 12 Ont. 411; Hexter *v.* Knox, 63 N. Y. 561 (rental value of premises during time lessee was deprived of use of them).

No abatement of rent during repairs. — Under lessor's covenant to repair, it has been held that lessee was entitled to no suspension of rent while repairs were being made. McClenahan *v.* New York, 102 N. Y. 75. Where (as in Louisiana), lessor is required by statute to repair, lessee is not entitled to damages for injuries to his business if such injuries are unavoidable and repairs are made in a reasonable time, but he is entitled to damages for injuries caused by negligence. Bonnecaze *v.* Beer, 37 La. An. 531.

Notice of want of repair (Thomas *v.* Kingsland, 12 Daly (N. Y.) 315; Guthman *v.* Castleberry, 49 Ga. 272 (*per* Warner, C. J.)), or at least knowledge of want of repair (Spellman *v.* Bannigan, 36 Hun (N. Y.) 174), is by some authorities held essential to the liability of lessor, though the contrary was held in Hayden *v.* Bradley, 6 Gray (Mass.) 425.

First putting in repair. — In Myers *v.* Burns, 35 N. Y. 269, it was held that the covenant to keep in repair implied that lessor should first put the premises in repair. In a lease with such a covenant of premises in Brooklyn, for a "first class hotel," it was held that the covenant was broken because the flues in four of the rooms were so defective that when fires were kindled the rooms were filled with gas and smoke.

Covenants to make outside repairs, if unlimited, bind lessor to rebuild if buildings are burned. Crocker *v.* Hill, 61 N. H. 345; Leavitt *v.* Fletcher, 10 Allen (Mass.) 119. Under such covenant lessee will be chargeable with expense of finishing the inside (Crocker *v.* Hill, *supra*), if he have covenanted for inside repairs.

The lessor will be allowed a reasonable time in which to rebuild (in above case six and one-half months), after which time he will be chargeable with the profits of the demised premises.

The covenant not a covenant to insure. — In Leavitt *v.* Fletcher, 10 Allen (Mass.) 119, it was held that lessor was not liable for the damages to lessee's carriages by falling of a carriage-house from an unexpectedly heavy fall of snow, although he was bound to rebuild.

Liability to third parties. — For breach of this covenant it is usually held that where a lessor is bound by express contract to repair, he is liable directly to third parties for injuries caused by failure to repair. Campbell *v.* Portland Sugar Co., 62 Me. 552; *per* Shaw, C. J., in Lowell *v.* Spaulding, 4 Cush. (Mass.) 277, 278.

Inability to perform. — Where a lessor announced in advance his inability to perform, and lessee thereupon, under an option, terminated the lease, it was held that lessee could not recover damages, the court holding that the doctrine of breach by repudiation in advance, did not apply (Johnstone *v.* Milling, 16 Q. B. D. 460), under the circumstances.

[1] **Implied covenants and duties of lessor as to repairs in America.** —

(*a*) *The general rule at common law* is, that there is no covenant on part of lessor to repair, but this rule has some exceptions. See *ante*, ch. 5, sec. 9 (*b*), note, "Covenants of lessor," &c., for authorities and general statement of the rule, with some of its exceptions.

When not liable to lessee. — And the lessor is not liable *to the lessee* for injuries from defects existing at the commencement of the tenancy (Humphrey *v.* Wait, 22 Up. Can. C. P. 580 (not liable for injuries to tenant caused by falling through open stove pipe hole, existence of which was known to tenant); Bowe *v.* Hunking, 135 Mass. 380 (not liable to tenant for injuries caused by giving way of defective staircase, not known to lessor to be dangerous at commencement of tenancy); Purcell *v.* English, 86 Ind. 34), unless he has been guilty of wilful misstatements or of fraudulent concealment of the dangerous condition of the premises (see *post*, note, "Implied duties . . . to disclose," &c., and ch. 13, sec. 1, note, "Defences in suits for rent").

When liable to third parties. — Lessor is liable to third parties for injuries resulting from nuisances existing upon the premises at the date of the demise (independently of the question whether he has been guilty of misrepresentations or *suppressio veri*), the tenant being also liable if the nuisance is continued. See *post*, ch. 19, sec. 1, note, "Liability of landlord to third parties," and sec. 2, note, "Liability of tenant to third parties."

Liability to lessee upon implied covenant. — Lessor is bound by an implied covenant to keep the *common* portions of premises separately demised to different tenants, in a suitable and safe condition for the general use (see *ante*, ch. 5, sec. 9 (*b*), note, "Covenants of lessor," &c.); and for breach of this covenant also he is liable to third parties if they are injured, as well as to the tenant.

Liability to lessee for subsequent negligence. — Lessor also is liable to lessee for subsequent negligence in care of portions of premises reserved to himself. For example: — He is liable for injuries caused by escape of water from defective waste water pipe under his own control. Priest *v.* Nichols, 116 Mass. 401; Totten *v.* Phipps, 52 N. Y. 354 (leaving trap door open at night in hallway, into which lessee of upper part of building fell and was killed); Eagle *v.* Swayze, 2 Daly (N. Y.) 140 (injury to furniture of lessee in lower story caused by fall of chimney left in ruinous condition with knowledge); Eakin *v.* Brown, 1 E. D. Smith (N. Y.) 36, 43 (*per* Woodruff, J.).

In Toole *v.* Beckett, 67 Me. 544, it was held that lessor was liable to lessee of lower story for injury to goods, caused by failure to repair roof so as to exclude rain.

In Tousey *v.* Roberts, 53 N. Y. Superior Ct. 446, the lessor of an apartment house was held liable for the damages caused by the negligence of an improper person left in charge of the elevator

Liability to lessee for subsequent nuisances. — Lessor will be liable to lessee for injuries if he subsequently establish a nuisance in parts of premises not demised. Dyett *v.* Pendleton, 8 Cow. (N. Y.) 727; Halligan *v.* Wade, 21 Ill. 470.

(*b*) *Statutory liability to repair.* — *In Georgia* and *Louisiana* the lessor is required, by provisions of the codes, to make repairs as therein specified. In *California* (Civil Code, secs. 1929, 1941, 1942; Van Every *v.* Ogg, 59 Cal. 563), lessor of dwelling-house is required to make repairs, and doubtless other states or provinces have similar provisions.

By the civil law lessee, without any special provision, is bound to keep the property fit for the purposes for which it was leased. Gray, J., in Viterbo *v.* Friedlander, 120 U. S. 707, 712.

respect should be inserted in the lease or agreement (*a*): the tenant should not rely upon any oral promise made before the lease or agreement is executed (*b*). There is no implied duty in the owner of an *unfurnished* house which is in a ruinous and unsafe condition to inform a proposed tenant that it is unfit for habitation:[1] and no action will lie against him for an omission to do so, in the absence of express warranty or active deceit (*c*).

Notice. — Where the lessor covenants to do repairs, the condition is implied that notice of want of repair must be given, and the lessee cannot proceed for a breach of such covenant, without first giving such notice. So it was held in Makin *v.* Watkinson (*d*), which case was followed with approval by the Court of Appeal in Hugall *v.* M'Lean (*e*) in

(*a*) Tidey *v.* Mollett, 16 C. B., N. S. 298; 33 L. J., C. P. 235.

(*b*) Seago *v.* Deane, 4 Bing. 459; Haldane *v.* Newcomb, 12 W. R. 135.

(*c*) Keates *v.* Earl Cadogan, 10 C. B. 591. As to furnished house, see *ante*, 173.

(*d*) Makin *v.* Watkinson, L. R., 6 Ex. 25; 40 L. J., Ex. 33; 19 W. R. 286; 23 L. T. 592 (*per* Bramwell and Channell, BB., diss. Martin, B.).

(*e*) Hugall *v.* M'Lean, 53 L. T. 568, *per* Brett, M. R., and Baggallay and Bowen, L.JJ., Brett, M. R., doubting "whether the landlord if he had notice aliunde would be liable."

These decisions, which are supported by a *dictum* in Moore *v.* Clarke, 5 Taunt. 96, are at variance with the ordinary rule that where a man contracts to do a thing he must either do it or pay damages, however unreasonable the contract may be. Neither Vyse *v.* Wakefield, 6 M. & W. 442, nor London and South-Western R. Co. *v.* Flower, L. R., C. P. D. 77,

[1] **Implied duties of lessor to disclose condition of premises.** — It is held in some, if not all of the American states, that lessor is liable for resulting damages if he knowingly lease premises in a dangerous condition, without disclosing fact of such condition (see *ante*, ch. 13, sec. 1, note, "Defences in suits for rent"), as, for instance, that they were infected with the small-pox (Minor *v.* Sharon, 112 Mass. 477; Cesar *v.* Karutz, 60 N. Y. 229), or that their sanitary condition was dangerous to health (Crump *v.* Morrell, 12 Phila. 249; Wallace *v.* Lent, 1 Daly (N. Y.) 481).

It has been held also that lessee may counter-claim damages for the fraudulent concealment of the fact that the premises had previously been used as a house of prostitution. Rhinelander *v.* Seaman, 13 Abb. N. Cas. (N. Y.) 455.

It has been held in Pennsylvania that a covenant might be implied that premises were in suitable condition from the insertion of covenant in the lease that they should be used only for a dwelling house. Wolfe *v.* Arrott, 109 Pa. St. 473.

In California the statute provides that the landlord must put a dwelling house into suitable condition for occupation, and repair subsequent dilapidations not caused by the negligence of the lessee. Civil Code, secs. 1929, 1941.

* which the tenant sued the landlord for breach of an [*596] agreement to keep drains in repair (by reason of which breach the tenant's house had been flooded with sewage), and the jury found that neither party knew of the defective condition of the drains, but that the tenant had not, and the landlord had, the means of knowing.

Construction of particular covenants for repair by landlord.—A covenant by lessor to repair the external parts of a demised house comprises the partition wall between it and an adjoining house; and where the adjoining house was pulled down by other persons whereby the wall was damaged, and the lessor did nothing to prevent it sinking, and suffered it to continue in a ruinous state, and refused to repair it, he was held liable for the expenses the lessee was put to in rebuilding the wall, and for glass broken by the sinking of it, but not for rent and the expenses of the lessee for other premises during the progress of the repairs (*f*). If a lessor covenant to keep the demised premises in repair, he is not bound to cleanse an ornamental piece of water in the grounds (*g*). If a lessor covenant that he will, in case the demised premises be burnt down, rebuild and replace the same in the same state they were in before the fire, he is only bound to rebuild what he let, and not any additional parts which may have been erected by the lessee (*h*). If a lessor sell premises let, under a lease not expired, and bind himself to do repairs "at the expiration of the tenancy," it appears that he is liable to do the repairs whenever and however the tenancy is determined (*i*).

which were relied on as authorities, are landlord and tenant cases, and it is submitted that Vyse *v.* Wakefield is distinguishable, on the ground that performance there would have been *impossible* without notice. It is to be observed (1) that both in Makin *v.* Watkinson and Hugall *v.* M'Lean, the agreement was to do *inside* repairs, and (2) that in neither of them does it appear that the landlord had power to enter to view the state of repair.

(*f*) Green *v.* Eales, 2 Q. B. 225.

(*g*) Bird *v.* Elwes, L. R., 3 Ex. 225; 37 L. J., Ex. 91.

(*h*) Loader *v.* Kemp, 2 C. & P. 375; 1 Selw. N. P. 434 (13th ed.).

(*i*) Goodson *v.* Goldsmith, 2 C. & P. 555.

SECT. 2. — *Implied Contract to Repair, &c.*

(a) *By Tenant.*

The contract of tenancy usually contains some express stipulation for repair by the tenant, but if it contain no such stipulation, or only contain a stipulation for rent, and whether it be by deed, writing without deed, or by parol only, a stipulation is implied by law — in the absence of any express stipulation, but not otherwise (*k*) — that the tenant will use the demised premises in a tenantlike manner. If the tenancy be for years, this obligation is merged in the more definite and statutory obligation not to commit *or permit* [*597] waste,[1] * which will be presently considered, but if the tenancy be at will or from year to year,[2] more difficult considerations arise.

Covenants to repair, &c., when implied as matter of fact. — Sometimes a covenant as to repairs, cultivation, &c., may be implied from words used in other covenants in the lease (*l*), or from the recitals (*m*). But such covenants are implied and found as matter of fact, and are *not covenants implied by law* from the mere relation of the parties as landlord and tenant.

On implied new tenancies. — We have already seen that a person let into possession under a *void* lease, ex. gr. a lease

(*k*) If there be an express stipulation to repair, no implied stipulation to use in a tenantlike manner arises. Standen *v.* Christmas, 10 Q. B. 135.

(*l*) *Ante*, 175.

(*m*) *Ante*, 177.

[1] **Implied covenants of lessees for years as to repairs.** — A lessee for years will be liable for permissive waste, if he suffer a building to decay for want of necessary repairs. Moore *v.* Townshend, 33 N. J. L. 284. He is bound to keep fences in order, and replace windows and doors. Genau *v.* Dist. of Columbia, 20 Ct. of Claims, 389, 392 (*per* Waldron, J.). He is not bound to replace buildings burned by unavoidable fires, or destroyed by act of God or the public enemies. *Per* Bicknell, C. J., in Warren *v.* Wagner, 75 Ala. 188, 200. Though required to make tenantable repairs, yet it has been said (by Bicknell, C. J., *supra*) that these did not include the ordinary wear and tear incidental to reasonable use. On the other hand, in the recent case of Davies *v.* Davies, 38 Ch. D. 499, it was held that lease, exempting lessee from liability for "fair wear and tear and damage by tempest," was a lease made without impeachment of waste, and therefore void in that case.

[2] **Implied covenants of lessee from year to year, as to repairs.** —

for more than three years not made by deed, or holding over after the expiration of a lease and paying or agreeing to pay rent, becomes a tenant from year to year, *upon the terms of the lease*, so far as they are applicable to and not inconsistent with a yearly tenancy, so as to be liable as upon a covenant to repair (*n*).

Liability of tenant at will, or from year to year. — What is the extent of the implied liability of a tenant at will or of a tenant from year to year for repair, it is not easy to say. A tenant at will is clearly not liable for permissive waste (*o*),[1] nor is a tenant from year to year (*p*).

It has been said twice at nisi prius that a tenant from year to year is bound to keep the demised premises "wind and water tight" (*q*)[2]; but in one case Lord Kenyon appears to

(*n*) *Ante*, Chap. VI., Sect. 2. And see especially Martin *v.* Smith, L. R., 9 Ex. 50. As to agreement for lease, see Walsh *v.* Lonsdale, *ante*, p. 86.

(*o*) Countess of Shrewsbury's case, 5 Co. (vol. 3 of the 1826 edition), 13; Cro. Eliz. 779, 784.

(*p*) *Post*, Sect. 5.

(*q*) Auworth *v.* Johnson, 5 C. & P. 239, *per* Lord Tenterden, C. J., and

This covenant is quite limited, but it is hard to tell exactly how far it extends. Chief Justice Waite has said (in United States *v.* Bostwick, 94 U. S. 53, 56), that it was in effect nothing more than a covenant against voluntary waste; and that it was not a general covenant to repair, "but to so use the property as to avoid the necessity of repairs as far as possible." That case decides that lessee is not liable for permissive waste (as natural decay), thus agreeing with the text.

Brown *v.* Newbold, 44 N. J. L. 266, however, holds the contrary, that he is liable. Hall, J., in Hughes *v.* Vandstone, 24 Mo. App. 637, said the lessee's implied covenant is to keep the premises in as good repair as he receives them, ordinary wear and tear and accidental injuries excepted, nor suffer voluntary waste.

Whether the tenancy be at will, or from year to year or for years, the tenant is not required to rebuild, or to make substantial and lasting repairs. Eagle *v.* Swayze, 2 Daly (N. Y.) 140 (not required to rebuild a chimney which had fallen down); Johnson *v.* Dixon, 1 Id. 178, 180 (under a letting of a stall at $2.50 per month, lessee is not required to relay a rotten floor); Long *v.* Fitzimmons, 1 W. & S. (Pa.) 530; Libbey *v.* Tolford, 48 Me. 316 (*per* Appleton, J.).

[1] **Implied covenants of lessee at will, as to repairs.** — A tenant at will is not liable for permissive waste. Lothrop *v.* Thayer, 138 Mass. 466 (burning of demised premises); Scott *v.* Hale, 16 Me. 326 (not liable for burning the premises if he exercise the same care which a prudent man would exercise on his own premises). He is liable for voluntary waste. Phillips *v.* Covert, 7 Johns. 1. An accidental fire, without negligence, is permissive, not voluntary waste. U. S. *v.* Bostwick, 94 U. S. 53, 68.

[2] **Wind and water tight.** — In Blood *v.* Spaulding, 57 Vt. 422, 424, Bowers,

have confined the tenant's obligation to repairing the consequences of his own acts, such as "putting in windows or doors that have been broken by him" (*r*); and in another, Gibbs, C. J., declared that it had always been held that a tenant from year to year is not liable to general repairs (*s*); while in another it was said that the tenant is not bound to rebuild or replace (*t*). There is moreover no reported case, so far as the Editor is aware, in which a tenant from year to year has been successfully sued for non-repair only, upon the implied agreement to keep premises "wind and water tight." But the two nisi prius dicta above adverted to appear to have been generally adopted (*u*), and the only question [*598] at the present day appears to be what meaning * can be given to them. On the whole it is considered that the expression ought to be construed strictly in favour of the tenant. To put an example, it would seem that the broken glass of windows need not be replaced by new glass, but that an exclusion of wet by boards or other unsightly modes would be sufficient.

see the note; Leach *v.* Thomas, 7 C. & P. 327, *per* Patteson, J.

(*r*) Ferguson *v.* ———, 2 Esp. 590, cited as Ferguson *v.* Black, in Horsefall *v.* Mather, *infra*.

(*s*) Holt, N. P. C. 7. In that case the action appears to have been for voluntary waste.

(*t*) Wise *v.* Metcalfe, 10 B. & C., at p. 314. This was an ecclesiastical dilapidations case, and only bears indirectly on the point.

(*u*) See for instance, Wise *v.* Metcalfe, 10 B. & C. at p. 312; Chitty on Contracts, 316, where it is said that "the tenant is liable if he omit to adopt reasonable and usual precautions to obviate the occurrence of great and manifest injury to the premises," putting as an example, that "if a window or tile were even accidentally broken he would be liable if he did not repair it, provided the plain consequences of his neglect would be a serious damage to the house from wet or the like."

J., said that a tenant by the year must keep the buildings "wind and water tight, in the absence of any agreement to repair."

Fencing. — It has been held in several cases that tenants on shares must keep the fences in repairs. Fenton *v.* Montgomery, 19 Mo. App. 156; Blood *v.* Spaulding, 57 Vt. 422; Moulton *v.* Moore, 56 Id. 700. If tenant fail to repair fences, landlord may maintain action therefor as for injury to inheritance. *Per* Jewett, J., in Waggoner *v.* Jermaine, 3 Denio (N. Y.) 306, 311, citing Lord Kenyon, Ch. J., in Cheetham *v.* Hampson, 4 Term R. 318.

(b) *By Landlord.*

No implied covenant by landlord. — There is, in ordinary cases (*x*), no covenant or promise *implied by law* on the part of the lessor of an unfurnished (*y*) house or land (*z*) that it is reasonably fit for habitation, occupation or cultivation: nor that the house will endure during the term: nor that the lessor will do any repairs whatever (*a*).[1] Nor is there any implied covenant by the lessor of two adjoining houses, the occupiers of which are under covenant to repair, that he will keep either house in such state as to enable the covenants with respect to the other to be performed (*b*). Much less is there an implied covenant by the landlord to repair fences separating the demised land from his own (*c*).

Although in letting a furnished house the lessor impliedly promises that it is reasonably fit for occupation (*d*),[2] in the absence of any agreement on the subject, a person who agrees to take a house unfurnished must take it as it stands, and cannot call on the lessor to put it into a condition which makes it fit for living in (*e*). Before a person takes, or agrees to take, a lease of a house for a long term, with the usual covenants to keep it in repair during the term, he should have the premises carefully examined and reported on

(*x*) For exception in case of letting at certain low rents, see Housing of Working Classes Act, s. 14, and p. 174, *ante*.

(*y*) Hart *v.* Windsor, 12 M. & W. 68.

(*z*) Sutton *v.* Temple, 12 M. & W. 52; Erskine *v.* Adeane, 42 L. J., Ch. 835.

(*a*) *Ante*, 173; Pomfret *v.* Ricroft, 1 Wms. Saund. 321, 322, note (1); Pindar *v.* Ainsley, cited 1 T. R. 310, 312. As to fire, see Lofft *v.* Dennis, 1 E. & E. 474; 28 L. J., Q. B. 168.

(*b*) Colebeck *v.* Girdlers' Co., 45 L. J., Q. B. 225.

(*c*) Erskine *v.* Adeane, 42 L. J., Ch. 835.

(*d*) Smith *v.* Marrable, 11 M. & W. 5; Wilson *v.* Hatton, 36 L. T. 373; *ante*, 174.

(*e*) Chappell *v.* Gregory, 34 Beav. 250.

[1] See *ante*, sec. 1, note, "Implied covenants . . . as to repairs," &c., and ch. 5, sec. 9 (*b*), note, "Covenants of lessor," &c.

There is a special statutory obligation to repair in some states, and there is an obligation generally to repair common parts of premises demised to different tenants, &c.

[2] It has been held in several cases in New York that there is no implied covenant that a furnished house is fit for occupation. Chadwick *v.* Woodward, 13 Abb. N. Cas. (N. Y.) 441; Franklin *v.* Brown, 53 N. Y. Superior Ct. 474.

by an experienced surveyor; otherwise he may unwittingly incur very serious liabilities, especially if the foundations are defective, or the house is so slightly and cheaply built as not to be likely to last during the whole term, without considerable repairs, which is not unfrequently the case. Even where the premises become in a dangerous state for want of substantial repairs, and the landlord has notice to that effect, there is no implied obligation on his part to do any such repairs (*f*).

Where the landlord expressly binds himself to do any repairs, there is no implied condition that if such repairs [*599] be not done the *tenant may quit (*g*): but it was held in an old case that the tenant may do the repairs, and deduct the expense from the rent (*h*), and such would seem still to be the law (*i*). At any rate the tenant could counter-claim for the expense, if sued for the rent.

SECT. 3. — *Remedies for Non-repair.*

(a) *By Exercise of Right of Entry to Repair.*

Right to enter to repair. — A stipulation that the landlord may re-enter for the purpose of viewing the state of repair is very commonly inserted in leases, and a further stipulation is not frequently added, that the landlord may upon breach of the tenant's covenant himself execute necessary repairs at the tenant's expense. Without a distinct stipulation to that effect a landlord has no right to enter his tenant's premises to repair them (*k*): although the breach of the tenant be clear, although the landlord be liable to a forfeiture under a superior lease, and although the entry be by leave of sub-tenants, he commits a trespass which will be restrained by injunction (*l*). Where premises which were sublet became out

(*f*) Gott *v.* Gandy, 2 E. & B. 845.

(*g*) *Ante*, 173.

(*h*) Beale and Taylor's case, 1 Leon. 237.

(*i*) Three cases cited *contra* in many former editions of this work appear to have been so cited by mistake.

(*k*) Barker *v.* Barker, 3 C. & P. 557; Neale *v.* Wyllie, 3 B. & C. 533; Worcester School Trustees *v.* Rowlands, 9 C. & P. 739.

(*l*) Stocker *v.* Planet Building Society, 27 W. R. 877—C. A., affirming decision of Jessel, M. R.

of repair, and the superior landlord gave notice to his immediate lessee to repair them at the peril of forfeiting his lease; and the sublessee, after receiving notice to repair, neglected to do so, whereupon the lessee, in order to avoid a forfeiture of his whole estate, entered on the premises, and put them in tenantable repair; it was held that though he might be a trespasser for so doing, yet that he might recover against his subtenant the whole expense so incurred, notwithstanding that the premises were afterwards entirely rebuilt before the action for the recovery of such expense was brought (*m*).

Liability to third persons. — Generally speaking, the tenant or occupier, and not the landlord, is liable to third persons for any accident or injury occasioned to them by the premises being in a dangerous condition from non-repair (*n*).

(b) *By Action for Damages.*

By action for damages. — If the demise be under seal, the remedy for non-repair, &c., is by action on the covenant. In the case of reciprocal covenants *cross- [*600] actions would have to be brought (*o*) before the Judicature Act, but a counter-claim may not be set up by the defendant. If the demise be not under seal, the remedy is by action on the simple contract.

Damages during term, injury to reversion. — An action for non-repair may be maintained by the landlord during the continuance of the term (*p*), and in such action the proper measure of damages is, not the amount that would be required to put the premises into repair, but the amount to which the reversion is depreciated in marketable value by the premises being out of repair (*q*)—an amount which might be practically equivalent to nominal damages in the case of a lease having many years to run, but which would be larger

(*m*) Colley *v.* Streeton, 2 B. & C. 273.

(*n*) Gwinnell *v.* Eamer, L. R., 10 C. P. 658. See this question fully discussed, Chap. XIX., *post*.

(*o*) Leeds *v.* Cheetham, 1 Sim. 151.

(*p*) Luxmore *v.* Robson, 1 B. & A. 584.

(*q*) Smith *v.* Peat, 9 Ex. 161; 23 L. J., Ex. 84; Turner *v.* Lamb, 14 M. & W. 412; Worcester School Trustees *v.* Rowlands, 9 C. & P. 734, 739; Coward *v.* Gregory, L. R., 2 C. P. 153; Mills *v.* East London Union, L. R., 8 C. P. 79; 42 L. J., C. P. 46.

and larger, the shorter the residue of the term happened to be. The landlord is not bound to expend the damages recovered in repairing the premises (*r*), and yet continues to have the benefit of the covenant to repair, upon which he may sue again, if the tenant continue to break it: it is conceived, however, that in such second action, he could only recover damages in respect of additional non-repair.

Damages at end of term. — Upon the execution of a writ of inquiry in an action for dilapidations, two surveyors were called on each side. Those called by the plaintiff estimated the dilapidations, the one at 119*l.*, the other at 124*l.* Those called for the defendant estimated them, the one at 65*l.* 15*s.*, the other at 68*l.* The jury returned a verdict for only 36*l.* 10*s.* The court ordered the inquisition to be set aside without costs, unless the defendant would consent to the verdict being entered for 65*l.* 15*s.* (*s*). In an action for non-repair, and leaving out of repair at the end of the term, the jury may give to the landlord not only the amount or the actual expenses of the repairs, but also a compensation for the loss of the use of the premises whilst they are necessarily undergoing repair (*t*).

As to damages where the premises are about to be demolished, see p. 591, ante.

Breach of covenant in sublease. — In an action for breach of covenant in a sublease to repair, whereby the plaintiff's term in the premises was forfeited, the plaintiff cannot recover the value of his term if the superior landlord has brought his ejectment for the non-repair, as well as for breach of other covenants not contained in the sublease, if it is not proved that the forfeiture was caused by the acts of the defendant; but he may recover the amount of dilapidations at the time of the ejectment, though his own term is determined (*u*). [*601] He may recover substantial damages for *non-performance of the covenant to repair, &c., contained in the sublease notwithstanding both he and the defendant

(*r*) Worcester School Trustees *v.* Rowlands, 9 C. & P. at p. 639.

(*s*) Weeding *v.* Mason, 2 C. B., N. S. 382.

(*t*) Woods *v.* Pope, 6 C. & P. 782; 1 Bing. N. C. 467.

(*u*) Clow *v.* Brogden, 2 M. & G. 39.

have been ejected by the superior landlord for non-payment by himself of the rent reversed in the original lease (*x*); but if he do repairs himself to save a forfeiture, he cannot recover the cost of such repairs from the subtenant (*y*). Where the covenants differ from those in the original leases, and there is no covenant to indemnify the lessee against breach of covenants in the original lease, the lessee cannot recover the costs of an action brought against him by the original lessor for the mere dilapidations which he might have paid for before that action was commenced (*z*); or which he might have afterwards paid into court (*a*). A covenant to repair contained in a sublease, though in the same language as the covenant in the original lease, yet may be different in effect, owing to the sublease having been granted subsequently to the original lease, and when the premises had become in a different condition (*a*).

Action by lessee against assignee. — If a lessee assign over, subject to the performance by the assignee of the covenants in the lease from the day of assignment, and one of the covenants is a general one to repair and keep in repair, on which the lessor afterwards recovers against the lessee, the latter can recover over against his assignee for those dilapidations only which have taken place after the assignment (*b*). Where an assignee covenanted to indemnify the lessee, and the lessee, being sued by the lessor, paid money into court, but incurred extra costs, it was held that these extra costs were recoverable under the covenant of indemnity, as being the necessary result of the breach (*c*).

(c) *Remedy for Non-repair by Re-entry.*

Entry or ejectment for non-repair, &c. — Unless there be a proviso for re-entry applicable to the covenants to repair,

(*x*) Davis *v.* Underwood, 2 H. & N. 570; 27 L. J., Ex. 113.

(*y*) Williams *v.* Williams, 43 L. J., C. P. 382; L. R., 9 C. P. 659; 30 L. T. 638; 22 W. R. 706.

(*z*) Penley *v.* Watts, 7 M. & W. 601; Logan *v.* Hall, 4 C. B. 598.

(*a*) Walker *v.* Hatton, 10 M. & W. 249; 2 Dowl., N. S. 263.

(*b*) Hawkins *v.* Sherman, 3 C. & P. 459.

(*c*) Howard *v.* Lovegrove, 23 L. T. 396.

&c., a breach of such covenants will not warrant a re-entry for a forfeiture, but only an action for damages (*d*). Where there is such a proviso, the lessor or his assigns may re-enter or maintain an ejectment for the whole of the demised premises, if any part thereof be out of repair, at any time during the term; and (at common law) without giving any previous notice to the lessee or his assignee, or subtenant, to repair (*e*), and the same rule applies at common law where there is merely an agreement for a lease, with a proviso for re-entry on non-performance of covenants (*f*). But this has [*602] been altered *by s. 14 of the Conveyancing Act, the effect of which has been already considered (ante, Ch. VIII., Sect. 6, p. 328).

Effect of double covenant. — Where a lease contained a general covenant to repair and keep in repair the demised premises during the term, and another covenant to repair specific defects within three months after notice, and a proviso for re-entry on breach of any covenant; it was held, that such covenants were perfectly distinct, and that the landlord might lawfully re-enter for a forfeiture created by the non-repair pursuant to the general covenant, without giving any previous notice to repair (*g*). And even where a notice is given, it will be taken to apply to the general and not to the specific covenant, if the words be general. Therefore, where the landlord gave the tenant a notice requiring him *forthwith* to put all the demised premises into repair, agreeable to the covenant in that behalf, it was held, that such notice would not prevent an ejectment being brought within three months afterwards for breach of the general covenant to repair (*h*). But if the words be specific, the notice will be taken to give the time specified, and apply to the specific covenant to repair after notice. Therefore, where the landlord gave the tenant *notice to repair within three months* then

(*d*) Cole Ejec. 403, 422.

(*e*) Baylis *v.* Le Gros, 4 C. B., N. S. 537.

(*f*) Hayne *v.* Cummings, 16 C. B., N. S. 421.

(*g*) Baylis *v.* Le Gros, 4 C. B., N. S. 537.

(*h*) Roe *d.* Goatley *v.* Paine, 2 Camp. 520; Few *v.* Perkins, L. R., 2 Ex. 92; 36 L. J., Ex. 62. In the latter case, the notice was to repair "in accordance with the *covenants*," in the plural.

next, it was held that such notice amounted to a waiver of any forfeiture during the three months for breach of the general covenant to repair, and that no ejectment could be maintained until after the expiration of that period (*i*): and where a lease contained a general covenant to repair, &c., with a proviso for re-entry *in case of non-repair for three months after notice*, or on breach of any other covenant, that no ejectment could be maintained for non-repair until after the expiration of a three months' notice (*k*). A lease from A. to B. contained a general covenant to repair; also a covenant to repair specific defects within two months after notice, in failure whereof A. might re-enter and do such repairs at B.'s expense, with power to distrain for the amount as for rent in arrear; also a proviso for re-entry on breach of any covenant. It was held, that a notice by A. to B. to do certain repairs, in default whereof A. would do them, and charge B. with the expense, pursuant to the lease, amounted to a waiver of any forfeiture for breach of the general covenant to repair committed prior to the expiration of the notice; and that after expiration of notice, although A. might enter and do the repairs at B.'s expense, yet he could not maintain ejectment for any previous breach of the general covenant to repair (*l*).

* **Non-repair is a continuing breach.** — Where there [*603] is a general covenant to repair and *keep* in repair during the term, non-repair is a *continuing* breach of covenant, for which an ejectment may be maintained, if the lease contain a proviso for re-entry applicable to such covenant (*m*). But a covenant to *put* in repair is not a covenant the breach of which is continuing (*n*). Acceptance of rent, which becomes due pending a notice to repair, is no waiver of a subsequent forfeiture occasioned by non-compliance with such notice (*o*). Acceptance of rent after the commencement of

(*i*) Doe *d.* Morecraft *v.* Meux, 4 B. & C. 606.

(*k*) Doe *d.* Rankin *v.* Brindley, 4 B. & Ad. 84.

(*l*) Doe *d.* Rutzen *v.* Lewis, 5 A. & E. 277; and see Doe *d.* Pittman *v.* Sutton, 9 C. & P. 706; Cole Ejec. 423.

(*m*) Doe *d.* Hemmings *v.* Durnford, 2 C. & J. 667; Doe *d.* Baker *v.* Jones, 5 Exch. 498; Bennett *v.* Herring, 3 C. B., N. S. 370.

(*n*) Coward *v.* Gregory, L. R., 2 C. P. 153.

(*o*) Doe *d.* Rankin *v.* Brindley, 4 B. & Ad. 84.

an ejectment is no waiver of the forfeiture for which such action was brought (*p*).

(d) *By Action for Specific Performance.*

Specific performance. — Courts of Equity never decreed the specific performance of a general covenant to repair, but always left the party to his remedy by action at law for damages (*q*). It was otherwise with respect to a covenant to build (*r*); unless, indeed, the buildings were to be erected under the direction or superintendence of some architect, surveyor or other person over whom the court has no control (*s*). The same rule will no doubt be followed by the High Court under the Judicature Act.

SECT. 4. — *Obligations to Cultivate.*

Under what circumstances the liability arises. — The mere relation of landlord and tenant creates an implied obligation on the part of the tenant to manage and use a farm in a husbandlike manner according to the custom of the country where the premises are situated (*t*), which custom is incorporated in the lease or agreement unless it contains some express covenant or promise *inconsistent* with such custom and sufficient to exclude it (*u*). A covenant to cultivate a farm according to the custom of the country on the four-course system, means only so far as such custom is universally [*604] * obligatory in that part of the country (*x*). In

(*p*) Doe *d.* Morecraft *v.* Meux, 1 C. & P. 346; Jones *v.* Carter, 15 M. & W. 725.

(*q*) See Hill *v.* Barclay, 16 Ves. 405; City of London *v.* Nash, 1 Ves. 12; 3 Atk. 515; Lucas *v.* Commerford, 3 Bro. C. C. 166; Paxton *v.* Newton, 2 Sm. & Giff. 437; Moseley *v.* Virgin, 3 Ves. 184; Fry, s. 48.

(*r*) 4 Jarm. Prec. 407 (3rd ed.).

(*s*) See Form, App. C., Sect. 14.

(*t*) Powley *v.* Walker, 5 T. R. 373; Legh *v.* Hewitt, 4 East, 154. These cases decide that there is an obligation to cultivate properly, not that there is an obligation to continue cultivating in spite of losses certain to arise from low prices for agricultural produce and heavy expenses for agricultural labor. But it is submitted that such an obligation exists.

(*u*) Hutton *v.* Warren, 1 M. & W. 466; Wigglesworth *v.* Dallison, 1 Doug. 201; 1 Smith L. C. 598 (7th ed.); Senior *v.* Armytage, Holt, 197; Clarke *v.* Roystone, 13 M. & W. 752; Wilkins *v.* Wood, 17 L. J., Q. B. 319; 12 Jur. 583. As to "custom of country," see Chap. XX., Sect. 5, *post*.

(*x*) Newson *v.* Smythies, 1 F. & F. 477; 3 H. & N. 840.

order to constitute such a custom, or, more properly speaking, usage, as is binding on the tenant, it is not necessary that it should have been immemorially adopted; it is sufficient if there be a general usage applicable to farms of a similar description (*y*). In an action against a tenant on a promise that he would occupy a farm in a good and husbandlike manner, according to the custom of the country; an allegation that he had treated the estate contrary to good husbandry and the custom of the country, is proved by showing that he had treated it contrary to the *prevalent* course of good husbandry in that neighborhood; as by tilling half his farm at once when no other farmer tilled more than a third, though many tilled only a fourth; and it is not necessary to show any precise definite custom or usage in respect to the quantity tilled (*z*). The implied obligation to manage a farm in a husbandlike manner was held to be broken, when evidence was given of dung and compost having been carried off the premises, without any stipulation or agreement to that effect having been entered into (*a*).

Contracts respecting mode of tillage. — Covenants respecting the mode of tillage to be adopted by the tenant must necessarily vary so much in their terms, according to the agreement of the parties, that little can be said on the subject. They are generally framed in accordance with the custom of the country where the lands are situated, with such variations as the parties specially agree on. Such covenants are introduced, in nearly every instance, for the protection and benefit of the landlord, and to prevent the tenant from overcropping and deteriorating the property during the term, and leaving it in an impoverished state at the expiration thereof. Those of most common occurrence are the covenant not to break up meadow pasture (which might be done for the purpose of the heavy crops derivable at first from land so broken up) or to pay an increased rent for every acre broken up; the covenant not to sell hay, &c., but to consume it on the land by cattle; and the covenant to leave all manure on quitting.

Not to plough up meadow. — Upon a covenant not to plough

(*y*) Dalby *v.* Hirst, 1 B. & B. 224. (*a*) Powley *v.* Walker, 5 T. R. 373.
(*z*) Legh *v.* Hewitt, 4 East, 154.

any ancient meadow, and, if done, to pay an additional yearly rent per acre, the increased rent is not a penalty, but a liquidated satisfaction fixed and agreed upon by the parties (*b*).

Not to sell hay. — A covenant not to sell or carry away from the demised premises any hay, straw or manure which should be grown or produced thereon, under the increased rent of 10*l.* for every ton so sold or carried away, and so in proportion for any greater or less quantity, but to [*605] consume * the hay and straw by cattle, has been construed as a covenant giving the lessee the right to sell the hay and straw, on payment of the increased rent, and that, therefore, the breach was not well assigned (*c*). Where a lessee covenanted to leave fodder, &c., on the determination of his lease, and he became bankrupt, and his assignees refused the lease, it was held that they were not entitled to take the fodder (*d*). Where a farm lease contained a covenant by the lessee that "he should not nor would, during the last year of the term thereby granted, sell or remove from the said farm and lands any of the hay, straw and fodder which should arise and grow on the said farm and lands:" it was held, that the prohibition was not restricted to hay, straw and fodder which arose and grew on the farm in the last year of the term, but extended to that which had arisen and grown at any time during the term (*e*).

Contracts respecting manure. — Where the outgoing tenant covenants with his landlord to leave the manure made by him on the farm, and sell it to the incoming tenant at a valuation to be made by certain persons, the effect of such covenant is to give the outgoing tenant the right of on-stand for the manure upon the farm, and the possession of and property in it remains in him in the meantime. Therefore, if the incoming tenant remove and use it before such valuation, he is answerable to the outgoing tenant in trespass (*f*).

(*b*) Rolfe *v.* Peterson, 2 Bro. P. C. 436; 6 Id. 470; Jones *v.* Green, 3 Y. & J. 298.

(*c*) Legh *v.* Lillie, 6 H. & N. 165; 30 L. J., Ex. 25.

(*d*) *Ex parte* Nixon, 1 Rose, 445; *Ex parte* Whittington, Buck, 87.

(*e*) Gale *v.* Bates, 3 H. & C. 84; and see Massey *v.* Goodall, 17 Q. B. 310.

(*f*) Beaty *v.* Gibbons, 16 East, 116.

A covenant by the lessee that he would sufficiently muck and manure the land demised with two sufficient sets of muck within the last six years of the term, the last set to be laid on the premises within three years of the expiration of the term, is satisfied with the tenant's laying on two sets of muck within the last three years of the term, if he should think proper to so do (*g*). A condition not to sell, cart, or convey away any dung, compost, or manure from a farm, is broken by the removal of the dung of two cows which had been sold by the tenant, but were permitted by him to remain on the premises, they being entirely provided by the buyer with provender from elsewhere (*h*).

Sect. 5. — *Waste* (*i*).

(a) *What is Waste.*

Definition of waste. — Waste (vastum) is defined to be a spoil or destruction to houses, gardens, trees, or other corporeal hereditaments, to the injury of the * reversion or inheritance, and it has two divisions of great practical importance, voluntary waste, and permissive waste. [*606]

Voluntary waste. — Voluntary waste is actual or commissive,[1] as by pulling down houses, or altering their structure,

(*g*) Pownall *v.* Moores, 5 B. & A. 416.

(*h*) Hindle *v.* Pollitt, 6 M. & W. 529.

(*i*) For the law of Waste, generally, see Yool on Waste, &c. (1863, Maxwell).

[1] **Examples of voluntary waste.** — Destruction of ornamental trees, fences, walls, &c., and quarrying and removing stone, gravel, &c. (United States *v.* Bostwick, 94 U. S. 53); cutting down timber, digging up and carrying off soil, and burning wood-house (Robinson *v.* Wheeler, 25 N. Y. 252); removal of manure made on farm (Daniel *v.* Pond, 21 Pick. (Mass.) 367; and Walcott *v.* Pomeroy, 2 Id. 121); cutting timber (Phillips *v.* Covert, 7 Johns. (N. Y.) 1); burning buildings through gross carelessness (Mason *v.* Stiles, 21 Mo. 374, — wilful carelessness of lessee's clerk in applying lighted cigar to can of powder). In this case Scott, J., said, "The tenant is like a common carrier."

An action will lie for value of building burned through carelessness or negligence. Lee *v.* Payne, 4 Mich. 106, 123.

Change in premises. — Change of nature of premises constitutes voluntary

— the kind of damage which is sometimes provided against by express stipulation not to convert a house into a shop," &c.

Permissive waste. — Permissive waste[1] is a matter of negligence and omission only, as by suffering buildings to fall or rot for want of necessary reparations (*k*); the kind of damage which, where the contract of tenancy is in writing, is almost invariably provided against by express agreement to repair. It is not waste to omit to perform a covenant to put the demised premises into such repair as A. B. had previously put them into (*l*). The action for waste can only lie for that which would be waste, if there were no stipulation respecting it (*m*).

In addition to these two great divisions of waste, it is desirable to say a word or two about "meliorating waste" and "equitable waste."

Meliorating waste. — Meliorating or ameliorating waste is such voluntary waste as improves the demised premises, as

(*k*) Co. Lit. 53; Wood's Inst. 521; Bac. Abr. tit. Waste (B.).

(*l*) Jones *v.* Hill, 7 Taunt. 393, 396.

(*m*) Id. 396.

waste (*per* Parris, J., in Hasty *v.* Wheeler, 12 Me. 434, 436), but not if done under an implied authority (Holderness *v.* Lang, 11 Ont. 1).

American modification of doctrine of waste, as applied to wild lands. — This grew out of the different nature of the country, and it is difficult to tell exactly how far it extends.

In Crowe *v.* Wilson, 65 Md. 479, 480, 481, Bryan, J., said that tenants under renewable leases might commit in this country what would be termed waste in England, if they did not impair the security.

If they do impair security, they will be enjoined. Crowe *v.* Wilson, *supra*; see also Jackson *v.* Brownson, 7 Johns. 227.

In some parts of America a widow is dowable in wild lands. The court in Nova Scotia (*per* Young, C. J., in Titus *v.* Haines, 2 Russ. & Ches. (N. S.) 542, 547) says, "The widow must not commit waste; but the law of waste must vary and accommodate itself to the circumstances of a wild and unsettled country."

[1] **Examples of permissive waste.** — Accidental fires, without negligence (United States *v.* Bostwick, 94 U. S. 53, 68; Scott *v.* Hale, 16 Me. 326; Lothrop *v.* Thayer, 138 Mass. 466, 473); suffering buildings to decay for want of necessary repairs (Moore *v.* Townshend, 33 N. J. L. 284; U. S. *v.* Bostwick, 94 U. S. 53; Hill *v.* Woodman, 14 Me. 38, 43); explosion of nitro-glycerine, being in unlabelled package at office of express company, a lessee (Parrott *v.* Barney, 1 Sawyer C. Ct. 423). Company were held liable in this case for injury to demised premises, but not for portions undemised, they being entirely ignorant as to the contents of the package.

where a tenant puts a new front to his house: for such waste, it seems that unless substantial damages be proved, the tenant cannot be successfully sued (*mm*).

Equitable waste. — Equitable waste consists in acts of gross damage, usually the cutting down ornamental timber by a tenant "without impeachment of waste," and is so termed because before the Judicature Act only a court of equity took cognizance of it. It is now, by s. 25, subs. 3, within the cognizance of any branch of the Supreme Court; but as it can generally be committed by tenants for life only, contracts of tenancy between a landlord and tenant being never made without impeachment of waste, it is only necessary to mention it here for the purpose of pointing the distinction. Tenants for life, however, as we shall see presently, are by the Statute of Gloucester, and cases in which the liability of a tenant for life for waste is concerned will sometimes throw light upon the liability of a tenant under a landlord.

What acts constitute voluntary waste. — Voluntary waste chiefly consists in felling timber trees (*n*), pulling down houses (*o*), opening mines or pits (*p*), or changing the course of husbandry (*q*). Whatever does a lasting damage to the freehold or inheritance is waste; therefore, removing wainscots, floors, or other things once fixed to the freehold of a house, is waste (*r*); and if the * windows be [*607] broken or carried away, it is waste, although they were glazed by the tenant himself, for the glass is part of the house (*s*). If a house be destroyed by tempest, lightning, or the like, which is the act of God, it is not waste (*t*); but if the house be uncovered by tempest, it is said that a tenant for years must repair it, even though there be no

(*mm*) See Doherty *v.* Allman, L. R., 3 App. Cas. 709, in which an injunction to restrain meliorating waste by the conversion of store buildings into dwelling-houses was refused. The lease in this case was for 999 years, of which 900 were unexpired. See also Jones *v.* Chappell, L. R., 20 Eq. 539, and p. 608, *post*.

(*n*) Bac. Abr. tit. Waste (C. 2). See Phillips *v.* Smith, 14 M. & W. 589; Channon *v.* Patch, 5 B. & C. 897.

(*o*) Bac. Abr. tit. Waste (C. 5); Co. Lit. 53.

(*p*) Bac. Abr. tit. Waste (C. 3).

(*q*) Id. (C. 1).

(*r*) Id. (C. 6).

(*s*) Co. Lit. 53.

(*t*) Bac. Abr. tit. Waste (E); Co. Lit. 53 a; Smith L. & T. 261 (2nd ed.).

timber growing upon the ground, for the tenant must at his peril keep the house from wasting (*u*). Waste may be done in houses by pulling them down, or suffering them to be uncovered, whereby the rafters or other timber of the house become rotten (*u*); but merely suffering them to be uncovered without rotting the timber, is not waste: or if the house be uncovered when the tenant comes in, it is no waste to suffer it to fall down (*u*), although it would be otherwise if the tenant were to pull it down, unless he re-erect it again forthwith (*x*); but if a house built *de novo* was never covered in, it is not waste to abate it (*y*). If a lessee permit the walls to decay for default of daubing or plastering, that is waste (*z*), and if he suffer the houses to be wasted, and then fell down timber to repair the same, it is double waste (*a*); it is also waste not to repair fences (*b*).

Waste in warrens, parks, &c. — If the tenant of a dovehouse, warren, park, fishpond, or the like, take so many that such sufficient store be not left as he found when he came in, it is waste (*c*); and to suffer the pale to decay, whereby the deer are dispersed, it is waste (*c*). If the lessee of a warren by charter or prescription plough the land, it is waste: but it is otherwise if it be only land stored with conies, and not a legal warren; and stopping and digging coney burrows is not waste in a warren (*d*).

Waste by digging mines, &c. — Digging for gravel, lime, clay, brick-earth, stone, or the like, or for mines of metal, coal, or the like, hidden in the earth, and not open when the tenant came in, is waste (*e*): but the tenant may dig for gravel or clay for the reparation of the house (though no pit were open at the time of the lease), as well as he may take convenient timber trees (*f*). If the pit or mines were

(*u*) Co. Lit. 53 a; Bac. Abr. tit. Waste (C. 5); Smith L. & T. 262 (2nd ed.).
(*x*) Co. Lit. 53 a.
(*y*) Co. Lit. 53 a [note 345].
(*z*) 2 Roll. Abr. 816, pl. 36, 37.
(*a*) Co. Lit. 53 b.
(*b*) Cheetham *v.* Hampson, 4 T. R. 318.
(*c*) Co. Lit. 53 b.
(*d*) Id.; Moyle *v.* Moyle, Owen, 66; Lurting *v.* Conn, 1 Ir. Ch. Rep., N. S. 273.
(*e*) Bac. Abr. tit. Waste (C. 3); Co. Lit. 53 b; Viner *v.* Vaughan, 2 Beav. 466.
(*f*) Co. Lit. 53 b.

open before, it is no waste if the tenant continue to dig them for his own use; for it has become the mere annual profit of the land (*g*).

By not repairing sea-walls, &c. — It is waste to suffer a wall of the sea to be in decay, so as by the flowing and reflowing of the sea the meadow or marsh be surrounded *whereby it becomes unprofitable (*h*); but if it be [*608] surrounded suddenly by the rage or violence of the sea, as by tempest, without any default of the tenant, it is not waste (*i*): so if the tenant do not repair the banks or walls against rivers, or other waters, whereby the meadows or marshes are surrounded and become rushy and unprofitable, it is waste (*k*).

By changing the nature of the property. — If the tenant convert arable land into wood, or è converso, or meadow into arable, it is waste; for it changes not only the course of husbandry, but creates a difficulty in the proof of the title (*l*); and this would appear to be the case even where the act is done according to the custom of the country for the purpose of amelioration (*m*). If a tenant suffer arable land to lie fresh, and not manured, this is not waste, but ill-husbandry (*n*). If he pull down a malt-mill and build a corn-mill, it is waste (*o*): so if he convert a corn-mill into a fulling-mill, it is waste, though the conversion be to the lessor's advantage (*p*): so the conversion of a brewhouse worth 120*l.* per annum into other houses worth 200*l.* per annum is waste (*o*). Converting two chambers into one, or è converso, or converting a hand-mill into a horse-mill, is waste (*q*).

(*g*) 1 Wood's Inst. b. 2, c. 5, s. 41; 2 Blac. Com. 282; Co. Lit. 53 b, 54 b; Clavering *v.* Clavering, 2 P. Wms. 388. As to waste by tenant for life, in digging mines, see Bagot *v.* Bagot, 32 Beav. 509.

(*h*) Co. Lit. 53 a.

(*i*) Id. 53 b; Bac. Abr. tit. Waste (C. 1).

(*k*) Co. Lit. 53 b; Callis on Sewers, 146.

(*l*) London (City) *v.* Greyme, Cro. Jac. 182; Bac. Abr. tit. Waste (C. 1); Co. Lit. 53 b; Hob. 234; Murphy *v.* Daly, 13 Ir. Com. L. R. 239.

(*m*) Simmons *v.* Norton, 7 Bing. 640.

(*n*) 2 Roll. Abr. 814; Hutton *v.* Warren, 1 M. & W. 472.

(*o*) Cole *v.* Green, 1 Lev. 309; S. C., nom. Cole *v.* Forth, 1 Mod. 95.

(*p*) London (City) *v.* Greyme, *supra*.

(*q*) Co. Lit. 53 a [note 344]. And see Young *v.* Spencer, 10 B. & C. 145; Queen's College, Oxford *v.* Hallett, 14 East, 489.

By building a house. — It was laid down by Lord Coke, that if the tenant build a new house, it is waste; and if he suffer it to be wasted, it is new waste (*r*). But such is not the law at the present time. To build a new house on the demised land is not waste, unless it be an injury to the inheritance in the sense of destroying identity, "by what is called destroying evidence of the owner's title, and that is a very peculiar head of the law, which has not been extended in modern times" (*s*).

Construction of leasing power against waste. — Where a power of leasing was given, so that no clause should be contained in the lease, giving power to the lessee to commit waste, or exempting him from punishment for committing it; it was held, that a lease was good, though it contained a stipulation that the lessee should erect a new dwelling-house, with liberty to pull down some outbuildings, and to use the materials in erecting the house (*t*).

Counter-claim under Agricultural Holdings Act. — It was enacted by sect. 19 of the Agricultural Holdings Act, 1875 (38 & 39 Vict. c. 92), "where a tenant commits or [*609] permits waste," * and claims compensation under that act in respect of an improvement, "then the landlord shall be entitled, by counter-claim, but not otherwise," to obtain compensation on his part, provided that the waste was not committed or permitted more than 4 years before the determination of the tenancy.

This act is repealed and replaced by the Agricultural Holdings Act, 1883, 46 & 47 Vict. c. 61, s. 6 of which provides that "in the ascertainment of the compensation" payable to the tenant under that act "there shall be taken into account, in reduction thereof, any sums due to the landlord in respect of" (amongst other things) "any waste committed or permitted by the tenant." This section prescribes no limit of time within which the waste must have happened.

(*r*) Co. Lit. 53 a.

(*s*) Jones *v.* Chappell, L. R., 20 Eq. 539; 44 L. J., Ch. 658, *per* Jessel, M. R., citing Doe *v.* Earl of Burlington, 5 B. & Ad. 517.

(*t*) Doe *d.* Earl of Egremont *v.* Stephens, 6 Q. B. 208; Cole Eject. 427.

It is conceived that any waste not barred by a statute of limitations may be taken into account, and further, that the section creates no such change in the law as to make a tenant from year to year liable for permissive waste, but so far as regards permissive waste, applies to a tenant for years only.

(b) *Remedies for Waste.*[1]

At common law. — At common law an action for waste lay only against tenants by the curtesy, tenants in dower and guardians, whose estates were created by act of law (*c*). But tenants for life or years had an interest in the land by the act of the lessor, who might and ought to have provided against waste by some express covenant or condition; and such tenants were not liable at common law either for voluntary or permissive waste (*d*).

Statute of Marlebridge. — The Statute of Marlebridge (52

(*c*) Greene *v.* Cole, 2 Wms. Saund. 252; Smith L. & T. 259 (2nd ed.).

(*d*) Countess of Shrewsbury's case, 5 Co. R. 13 a; Cro. Eliz. 777, 784; 2 Inst. 145, 299; 2 Blac. Com. 282; Tudor, L. C., Real Prop. 90 (2nd ed.); Smith L. & T. 259 (2nd ed.).

[1] **Remedies for waste.** — These are (ordinarily) actions of waste, or civil actions in nature thereof (Lee *v.* Payne, 4 Mich. 106; Parrott *v.* Barney, 1 Sawyer, C. Ct. 423; Coale *v.* Han. & St. Jo. R. R. Co., 60 Mo. 227; Files *v.* Magoon, 41 Me. 104; Lienow *v.* Richie, 8 Pick. (Mass.) 235); or bills for accounts (White *v.* Nelles, 11 Can. Sup. Ct. 587, 601), in which lessor may obtain an injunction.

The form of the suit at common law is (usually) trespass on the case, for injury to the reversion. 4 Kent's Com. sec. 119. If lessee in possession is a tenant at will, it has been sometimes held that the reversioner may maintain trespass, *quare clausum fregit*. Starr *v.* Jackson, 11 Mass. 518; 4 Kent's Com. sec. 119; but see Shenk *v.* Mundorf, 2 Bro. (Pa.) 109; Herr *v.* Slough, Id. 111; Addleman *v.* Way, 4 Yeates (Pa.) 218; Cooke *v.* Thornton, 6 Rand. (Va.) 8; Truss *v.* Old, Id. 556; Austin *v.* Sawyer, 9 Cow. (N. Y.) 39; Stuyvesant *v.* Dunham, 9 Johns. (N. Y.) 61; cited in note to Starr *v.* Jackson, as *contra*, and several English cases.

Against tenant at will. — It has been several times held that trespass, *quare clausum fregit*, would lie against a tenant at will (because commission of waste terminates the tenancy). Phillips *v.* Covert, 7 Johns. 1 (Kent, Ch., J., dissenting); Files *v.* Magoon, 41 Me. 104; Lienow *v.* Richie, 8 Pick. 235.

An action will lie against a stranger who commits waste. Ayer *v.* Bartlett, 9 Pick. (Mass.) 156.

In such case both lessor and lessee may maintain separate actions, each for his respective injury. *Per* Parker, C. J., in Starr *v.* Jackson, 11 Mass. 518.

Hen. 3, c. 23), s. 2, enacts, "that farmers during their terms shall not *make waste,* sale or exile (*e*) in houses, woods or men, nor of anything belonging to the tenements that they have to farm, *without special licence* had by writing of covenant, making mention that they may do it; which thing if they do and thereof be convict, they shall yield full damage, and shall be punished by amerciament grievously."

Statute of Gloucester. — By the Statute of Gloucester (6 Edw. 1, c. 5) it is enacted that a man "from henceforth shall have a writ of waste in the Chancery against him that holdeth by law of England or otherwise for term of life, or for term of years, or a woman in dower; and he which shall be attained of waste, shall lose the thing which he hath wasted, and moreover shall recompense thrice so much as the waste shall be taxed *at" (*f*). Both statutes are still unrepealed. Read by itself the Statute of Gloucester plainly works a forfeiture of the *demised premises* for waste, but the abolition of the writ of waste, along with real actions generally, by 3 & 4 Will. 4, c. 27, s. 36, has been generally considered to carry with it the abolition of the special penalties of forfeiture and treble damages (*g*).

[*610]

Construction of Statutes of Marlebridge and Gloucester. — Upon these two statutes, which must be read together, two questions have from time to time arisen. The first question is whether permissive waste is within the statutes. It is laid down expressly by Lord Coke (*h*) that it is; and the considered judgment in Yellowley *v.* Gower (*i*), which has been said (*k*) to have stifled any doubt arising from three cases in the Common Pleas (*l*), which are there reviewed, puts it that "there is no doubt of the liability of tenants for terms of

(*e*) "Vastum, vendicionem seu exilium non faciant."

(*f*) Co. Lit. 53; Greene *v.* Cole, 2 Wms. Saund. 252; Harnett *v.* Maitland, 16 M. & W. 262; 4 D. & L. 545.

(*g*) See Williams on Real Property, 31; 2 Steph. Com. 408.

(*h*) 2 Inst. 145.

(*i*) 11 Ex. at p. 294. In Harnett *v.* Maitland, 16 M. & W. at p. 262, the point appears to have been treated as an open one.

(*k*) In the notes to Greene *v.* Cole, 2 Wms. Saunders, at p. 646.

(*l*) Gibson *v.* Wells, 1 N. R. 280; Horne *v.* Benbow, 4 Taunt. 764; Jones *v.* Hill, 7 Taunt. 392.

years, for they are put on the same footing as tenants for life, both as to voluntary and permissive waste." More recently, however, the question has been spoken of as an open one (*m*). Lord Coke's view (*n*) appears open to question, on the grounds (1) that the Statute of Marlebridge by the words *make* "waste, sale or exile," points to positive acts only, (2) that the special licence spoken of in that statute points to such acts only, being inappropriate to a mere omission to repair, and (3) that it is unreasonable to suppose that the Statute of Gloucester would have prescribed so harsh a penalty as forfeiture for such mere omission. It is submitted, however, that Yellowley *v.* Gower would be considered as having been too long accepted to be now overruled, whatever might be the opinion of a court upon the correctness of that judgment. The almost universal insertion of the express covenant to repair in leases very greatly diminishes the practical importance of the question in the present day: but it should be added that the remedies upon the covenants in a lease have been construed as cumulative upon the remedies for voluntary waste (*o*), and that if this construction and Yellowley *v.* Gower be correct, they would be cumulative upon the remedies for permissive waste also.

* The second question, which is of greater practical [*611] importance, is what tenants come within the statutes.

The words of the Statute of Marlebridge are "farmers during their terms," and of the Statute of Gloucester "him that holdeth for term of life or for term of years."

Tenant at will. — A tenant at will is not within the statute,

(*m*) In Woodhouse *v.* Walker, L. R., 5 Q. B. D. at p. 407; *per* Lush and Field, JJ.; and in Barnes *v.* Dowling, 44 L. T. 809; in which latter case it was held that an *equitable* estate gave no right of action against a tenant for life for permissive waste.

(*n*) "To doe or make waste, in legall understanding in this place," says Lord Coke, in 2 Inst. 145, commenting on the Statute of Marlebridge, "includes as well permissive waste, which is waste by reason of omission, or not doing, as for want of reparation, as waste by reason of commission, as to cut downe timber, trees, or prostrate houses, or the like; and the same word hath the Statute of Gloucester, cap. 5, *que aver fait waste*, and yet it is understood as well of passive as of active waste, for he that suffereth a house to decay, which he ought to repaire, doth the waste."

(*o*) Keenlyside *v.* Thornton, 2 W. B. 1111.

and therefore not liable to an action upon the statute for either kind of waste (*p*); although if he *commit* waste, he thereby in effect determines his tenancy, and renders himself liable to an action of trespass at the suit of the landlord (*q*).

Tenant from year to year. — Tenants from year to year are not considered tenants for years, but only as tenants at will (subject and entitled to the usual or agreed notice to quit); consequently they are not liable for either kind of waste under the statutes (*r*); although in the absence of any express stipulation as to repairs, &c., they are said to be bound to use the premises in a tenantable and proper manner, and to keep them wind and water tight, and *not to commit waste* (*s*).

Tenant in common, &c. — A person who has a life interest by survivorship cannot sue for waste committed before his life interest vested (*t*). One tenant in common cannot maintain an action on the case, in the nature of waste, against another tenant in common (in possession of the whole, having a demise of the moiety from the first), for cutting down trees of proper age and growth for being cut; for it is no hurt to the inheritance. If, however, the trees were not fit to be cut, he might maintain such action (*u*). One tenant in common cannot maintain against another an action of trespass for cutting down in due season and carrying away the whole produce of the common property, viz. a crop of hay (*x*). But one tenant in common of a close is not entitled to dig and carry away the turf, as such act amounts to a destruction of the property, and therefore constitutes an ouster (*y*).

Joint tenants. — Where a farm was demised to A. and B.

(*p*) Co. Lit. 57 a; Countess of Shrewsbury's case, 5 Co. R. 13 a; Cro. Eliz. 777, 784; Gibson *v.* Wells, 1 B. & P., New R. 290; Harnett *v.* Maitland, 16 M. & W. 254; 4 D. & L. 545.

(*q*) Lit. s. 71; Countess of Shrewsbury's case, *supra*; *ante*, 228.

(*r*) See Auworth *v.* Johnson, 5 C. & P. 239; Torriano *v.* Young, 6 C. & P. 8; Leach *v.* Thomas, 7 C. & P. 327; Horsefall *v.* Mather, Holt N. P. C. 7. Burchell *v.* Hornsby, 1 Camp. 360, *contra*, appears to be incorrect.

(*s*) *Ante*, 597.

(*t*) Bacon *v.* Smith, 1 Q. B. 345.

(*u*) Martin *v.* Knowllys, 8 T. R. 145.

(*x*) Jacobs *v.* Seward, L. R., 4 C. P. 328.

(*y*) Wilkinson *v.* Haygarth, 12 Q. B. 837.

jointly, and A. sublet to C., and gave receipts for rent and a notice to quit in his name alone, it was held that A. and B. could not maintain a joint action against C. for pulling down a shed which stood on part of the demised premises (*z*).

Liabilities of executor. — An action for waste lies against an executor of a tenant for waste committed by his testator within six calendar months before his death (*a*).

*** Injunction against voluntary waste.** — In an action [*612] for commissive, or voluntary, waste, the plaintiff may claim a writ of injunction against the repetition or continuance of the injury complained of. It will be desirable to indorse the writ of summons accordingly, if an injunction be wished for (*b*); but the claim may be added afterwards by leave of the court or a judge (*c*), and an injunction may be granted by an interlocutory order in "any case in which it shall appear just or convenient" (*d*). Before the Judicature Act, such an application was usually made to the Court of Chancery (*e*). It seems that where a lessee commits acts of waste, for which damages merely nominal would be given, the High Court will not grant an injunction against him, if it appear that he does not contemplate committing any further waste, nor assert a right to commit it (*f*). The remedy by injunction is ordinarily the most efficient which can be adopted, as it prevents that injury which, by the other remedies, can only be compensated for after it is done.

A lessee will be restrained from working mines by instroke from adjoining mines if he has covenanted to sink a pit, and work through that only; but not otherwise (*g*). A tenant will be restrained from pulling down a house, and building another which the landlord objects to (*h*), or from making material alterations in a dwelling-house, as by changing it into a shop or warehouse (*i*); or removing plate-glass win-

(*z*) Steel *v.* Western, 7 Moore, 29.

(*a*) 3 & 4 Will. 4, c. 42, s. 2.

(*b*) R. S. C., Ord. II., Rule 1; Appendix (A.), Part II., Sect. 4.

(*c*) R. S. C., Ord. III., Rule 2.

(*d*) Judicature Act, 1873, s. 25, sub-sect. 8.

(*e*) See Smyth *v.* Carter, 18 Beav. 78; Duke of Beaufort *v.* Bates, 31 L. J., Ch. 481.

(*f*) Doran *v.* Carroll, 11 Ir. Ch. R. 379.

(*g*) Lewis *v.* Fothergill, L. R., 5 Ch. Ap. 103.

(*h*) Smith *v.* Carter, 18 Beav. 78.

(*i*) Douglass *v.* Wiggin, Johnson

dows from the shop or front of the house (*k*); or from throwing down inclosures, or pulling down houses (*l*); or from ploughing up meadow or pasture which has not been ploughed for twenty years (*m*), unless indeed a penal rent of so much per acre is reserved (*n*). So an injunction will be granted to restrain a tenant from year to year, under notice to quit, as in the case of a lessee for a longer term, from doing damage and from removing crops, manure, &c., except according to the terms of his lease or the custom of the country (*o*). An injunction has been granted to restrain a tenant from year to year, his servants, agents and workmen "from pulling down, damaging or destroying any of the buildings upon the farm and premises; and from cutting down, injuring or destroying any of the timber or other trees, timberlike trees, bark, wood or underwood, hedges or fences now standing upon the said farm and premises; and from ploughing up any of the [*613] ancient meadow, or any of the old * pasture land belonging to the said farm; and from sowing any part of the said farm and lands with mustard-seed or any other pernicious crop; and from removing off the said farm and lands any of the hay or straw, dung or manure produced or made thereon; and from doing any other waste or destruction to the said farm, lands and premises, or any part thereof," until, &c. (*p*). So an injunction has been granted against ploughing up pasture, where there was only a covenant to manage the farm in a husbandlike manner (*q*). Also to restrain a tenant from breaking up meadow for the purpose of building, contrary to an express covenant (*r*). Also to prevent a tenant from injuring fish-ponds (*s*), or a dovecote, or fixtures annexed to and forming part of the freehold;

Ch. R. (American), 435; 2 Story Eq. Jur. s. 913.

(*k*) Brocklesbury *v.* Munn, W. Notes, 1870, p. 42 (not further reported).

(*l*) Com. Dig. tit. *Chancery* (D. 11); Mayor, &c. of London *v.* Hedger, 18 Ves. 355; Hindley *v.* Emery, L. R., 1 Eq. 52; 35 L. J. Ch. 6.

(*m*) Com. Dig. tit. *Chancery* (D. 11).

(*n*) Woodward *v.* Giles, 2 Vern. 119; *ante*, 361.

(*o*) Onslow *v.* ———, 16 Ves. 173.

(*p*) Pratt *v.* Brett, 2 Madd. 62.

(*q*) Drury *v.* Molins, 6 Ves. 328.

(*r*) Ld. Grey de Wilton *v.* Saxon, 6 Ves. 106; Kimpton *v.* Eve, 2 V. & B. 349.

(*s*) Earl Bathurst *v.* Burden, 2 Bro. C. C. 64.

but not articles commonly called fixtures which are not so annexed (*t*), nor fixtures which the tenant is entitled to remove during the term, unless his lessor will purchase them according to the terms of the lease (*u*); but an injunction has been granted to restrain a tenant from removing trade fixtures, during the term, contrary to an express covenant in the lease (*x*).

No injunction to restrain permissive waste. — It is well settled that no injunction will be granted against a tenant for life to restrain permissive waste (*y*) and no such injunction would be granted against a tenant under a landlord. Nor would the specific performance of a covenant to repair be enjoined (*z*). It is suggested however that if trees were wrongly cut down by a tenant a mandatory injunction to plant new ones might be granted.

Sect. 6. — *Fences and Party-walls.*

Ownership of agricultural fences. — Where there are two adjacent fields, separated by a hedge and ditch, the ditch primâ facie belongs to the owner of the field in which the hedge is; and if there are two ditches, one on each side of the hedge, then the ownership of the hedge must be ascertained by proving acts of ownership (*a*). The rule about ditching is this — "No man making a ditch can cut into his neighbour's soil, but usually he cuts it to the very extremity of his own land; he is of course bound to throw the soil which he digs out upon his own land, and often, if he likes it, he plants a hedge upon the top of it; therefore, if he * cuts afterwards beyond the edge of the ditch, [*614] which is the extremity of his land, he cuts into his neighbour's land, and is a trespasser" (*b*): proof, therefore, of the ancient width of the ditch is evidence that the owner's

(*t*) Kimpton *v.* Eve, 2 V. & B. 349; Amos & F. 287 (2nd ed.).

(*u*) Rolleston *v.* New, 4 K. & J. 640.

(*x*) Bidder *v.* Trinidad Petroleum Co., 17 W. R. 53.

(*y*) Powys *v.* Blagrave, 4 D. G. M. & G. 448.

(*z*) See S. 3 (d), *ante*.

(*a*) Guy *v.* West, 2 Selw. N. P. 1244 (13th ed.); Cole Ejec. 242, 243.

(*b*) Vowles *v.* Miller, 3 Taunt. 137.

land did not extend beyond the outer edge thereof (*b*). One tenant in common of a hedge may maintain trespass against his co-tenant if the latter grub it up; but not for a mere clipping of the hedge (*c*).

Ownership of party-walls. — The common use of a wall separating adjoining lands belonging to different owners (the origin of which wall is unknown), is primâ facie evidence that the wall and the land on which it stands belong to the owners of those adjoining lands, in equal moieties as tenants in common. Where such an ancient wall was pulled down by one of the two tenants in common, with the intention of re-building the same, and a new wall was built of greater height than the old one, it was held not to be such a total destruction of the wall as to entitle one of the two tenants in common to maintain an action of trespass against the other (*d*). But where a tenant in common of a wall took off the coping-stones and heightened it, and built a washhouse against it, the roof of which occupied the whole width of the top of the wall, and also let a stone into the wall, with an inscription on it stating that the wall and the land on which it stood belonged to him, it was held, that on these facts the jury might find an actual ouster of the co-tenant (*e*). Where a party-wall was built at the joint expense of the two adjoining proprietors, and half its thickness stood on the land of each, the property in the wall follows the land on which it stands, and the two proprietors are not tenants in common of the wall (*f*). In contemplation of law such wall constitutes two distinct walls, and had to be so described under the old system of pleading (*g*). If a house or office be separated from other premises by a wall, and that wall belongs to the owner of the house or office, he is of common right bound to repair it; and an action will lie against him for any damages occasioned by his not doing so.

(*c*) Voyce *v.* Voyce, Gow, 201.

(*d*) Cubitt *v.* Porter, 8 B. & C. 257; Wiltshire *v.* Sidford, Id. 259, n.; Murley *v.* M'Dermott, 8 A. & E. 138.

(*e*) Stedman *v.* Smith, 8 E. & B. 1; 26 L. J., Q. B. 314; and see Doe *d.* Wawn *v.* Horn, 3 M. & W. 333; 5 Id. 564.

(*f*) Matts *v.* Hawkins, 5 Taunt. 20; Taylor *v.* Stendall, 7 Q. B. 634; 3 D. & L. 161.

(*g*) Murley *v.* M'Dermott, 8 A. & E. 138, 143; Cole Ejec. 242.

An action for not repairing fences, whereby another party is damaged, can, in ordinary cases, only be maintained against the occupier, and not against the owner of the fee, who is not in possession (*h*).

Action by landlord against tenant. — It is so notoriously the duty of the actual occupier of lands to repair *the fences, and so little the duty of the landlord, [*615] that without any agreement to that effect, the landlord may maintain an action against his tenant for not so doing, upon the ground of the injury done to his inheritance (*i*). If two persons are possessed of adjoining closes, neither being under any obligation to fence, each must take care that his cattle do not enter the land of the other; but it may be doubted, if two persons have the concurrent possession of land, for the purpose that each may take profits of a special nature, and distinct from, but not inconsistent with, the right of the other, whether either one is bound to guard against casual damage, which, during and by fair enjoyment of his right, may happen to the other (*k*). A person entitled to the minerals under the land of another, with licence to make a shaft opening into it, is, in the absence of any stipulation to the contrary, under a legal obligation to the owner of the surface soil to fence the shaft so as to prevent its being a source of danger to his cattle which may be upon it, and is liable to an action for injury occurring to those cattle for want of such fencing (*l*). Where the owner of two adjoining closes (A. and B.) separated by a fence and gate, which had always been repaired by the occupier of B., sold A. to the plaintiff, and two years afterwards sold B. to the defendant; it was held, that the latter was not bound to repair the gate, unless he or his vendor had made some specific bargain with the plaintiff to that effect; and that the doing of occasional repairs was not evidence of such bargain (*m*).

(*h*) Cheetham *v.* Hampson, 4 T. R. 318; Russell *v.* Shenton, 3 Q. B. 449. See *post*, Chap. XIX.

(*i*) Cheetham *v.* Hampson, 4 T. R. 319, *per* Lord Kenyon, C. J.; and see Whitfield *v.* Weedon, 2 Chit. R. 685.

(*k*) Churchill *v.* Evans, 1 Taunt. 529.

(*l*) *In re* Williams *v.* Groucott, 4 B. & S. 149; 32 L. J., Q. B. 239.

(*m*) Boyle *v.* Tamlyn, 6 B. & C. 329.

Tenant must preserve boundaries. — A tenant is obliged to preserve the boundaries of the land demised to him, and if he permit them to be destroyed, so that his landlord's land cannot be distinguished from his own, he must either restore the land specifically, or give other land of equal value in lieu (*n*); and this obligation is not merely to leave the boundary distinct at the end of the term, but to keep it distinct during the term, the court having jurisdiction during the term to ascertain the boundary if the tenant has confused it (*o*), and the obligation extends to cases where there are several co-lessees (*p*). A person has no right to undermine a party-wall between his own house, which he has pulled down, and his neighbour's, unless it can be done without injury to his neighbour's house; even although it is doubtful whether the interests of the parties in the wall are several or whether they are tenants in common of it (*q*). To an action of covenant for non-repair of a messuage, the [*616] *defendant may plead performance, except as to the repairs of a party-wall, and that those were rendered necessary and were done under 14 Geo. 3, c. 78, and did not become necessary by the defendant's default, and that the defendant was not the owner of the improved rent (*r*).

Waste and destruction of fences. — Although a tenant from year to year is not bound to put the premises into repair, he is not, on the other hand, at liberty to do anything which amounts to waste, or to a breach of the rules of good husbandry; he is not, therefore, entitled to cut and sell hedgerows, or, at least, not without making up the hedges and fences according to the course of good husbandry. If there be a quickset fence of white thorn, and the tenant stub it up or suffer it to be destroyed, that is destruction; but cutting quickset hedges is not waste, but "rather good husbandry, because they will grow the better" (*s*).

(*n*) Att.-Gen. *v.* Fullerton, 2 V. & B. 263.

(*o*) Spike *v.* Harding, L. R., 7 Ch. D. 871; 47 L. J., Ch. 323; 38 L. T. 385; 26 W. R. 420; in this case a reference was directed to chambers to ascertain the boundaries.

(*p*) Willis *v.* Parkinson, 1 Swanst. 49.

(*q*) Bradbee *v.* Governors of Christ's Hospital, 4 M. & G. 714; 2 Dowl., N. S. 164.

(*r*) Moore *v.* Clark, 5 Taunt. 90.

(*s*) Gage *v.* Smith, Godb. 209.

Bowen & Bowen.

Sect. 7. — *Trees and Timber* (*t*).

(a) *What is Timber.*

Definition of "timber." — By the term *timber* is meant properly such trees only as are fit to be used in building and repairing houses; thus, oak, ash, and elm trees are considered timber in all places, and under whatsoever circumstances they are grown (*u*). But only trees of not less than six inches in diameter or two feet girth (allowing for irregularities of shape) appear to be reckoned or considered as "timber" (*x*).

By the custom of the country. — Many descriptions of trees, which are not generally considered as timber, are so in some places by the custom of the country, being there used for the purpose of building; thus it has been laid down that horse-chestnuts, limes, birch, beech, asp, walnut trees, and the like, may under such circumstances be deemed timber, and are therefore protected by the law as such (*y*). It has been determined that in the county of York birch trees are timber, because they are used in that county for building sheep-houses, cottages, and such mean buildings (*z*): and it would seem that in Hampshire willows have been considered as timber by the custom of the country (*a*). Where * beech is admitted to be timber by the custom of the [*617] country, the general rule of law applicable to timber trees in general attaches upon it, so as to give it the properties and privileges of timber at twenty years' growth; and therefore upon an issue whether certain beech trees in the county of Bucks were or were not timber according to the custom of the country, the inquiry is confined to the nature of the wood and the period of its growth, whether of twenty years; and no evidence can be received to qualify its

(*t*) As to the Law of Trees and Woods generally, see an excellent Treatise by R. D. Craig, Q. C. (1866, Maxwell).

(*u*) Co. Lit. 53 a; Craig on Trees and Woods, 11.

(*x*) Whitty *v.* Ld. Dillon, 2 F. & F. 67.

(*y*) Duke of Chandos *v.* Talbot, 2 P. Wms. 606; Palmer's case, Co. Lit. 53 a, note (10).

(*z*) Countess of Cumberland's case, Moore, 813.

(*a*) Layfield *v.* Cowper, 1 Wood, Ex. R. 330; Gruffly *v.* Pindar, Hob. 219.

character of timber by showing that it was not deemed to be such in the county unless the tree contained ten feet of solid wood (*b*). But beech trees of thirty years' growth might be cut and managed as "saleable underwood," so as to render them liable to poor rates under 43 Eliz. c. 2 (*c*).

Pollards. — Although pollards have been said not to be timber (*d*), yet Lord King inclined to think them timber, provided their bodies were sound and good; and in an action to recover the value of pollards under the description of timber and timberlike trees, the plaintiff recovered a verdict (*e*).

(b) *Implied Rights as to Trees.*

Trees belonging to landlord, bushes to tenants. — The property in trees is vested in the owner of the inheritance of the land upon which they grow; for the property in trees, or of that which is likely to become timber, is in the landlord, and the property in bushes in the tenant, even when they are cut down by a stranger (*f*). If the tree grow near the confines of the land of two parties, so that the roots extend into the soil of each, the property in the tree belongs to the owner of that land in which the tree was first sown or planted (*g*), but formerly the parties in such a case were held to be tenants in common (*h*). A farmer who raises young fruit trees on the demised land, for filling up the orchards, is not entitled to sell them; but it is otherwise of a nurseryman by trade (*i*). Therefore a nurseryman, who has planted fruit trees in the way of his trade, may remove them, if not of larger growth

(*b*) Aubrey *v.* Fisher, 10 East, 446; Duke of Chandos *v.* Talbot, 2 P. Wms. 606; Co. Lit. 53; Craig on Trees and Woods, 11.

(*c*) Lord Fitzhardinge *v.* Pritchett, B. & S. 216; L. R., 2 Q. B. 135; 36 L. J., M. C. 49. The provisions of 43 Eliz. c. 2, as to saleable underwoods, are repealed by the Rating Act, 1874. As to the rateability of plantations under that act, see Chap. XV., Sect. 5, *ante*.

(*d*) Plowd. 470; Craig on Trees and Woods, 12, 13; Phillips *v.* Smith, 14 M. & W. 589.

(*e*) Rabbett *v.* Raikes, Suffolk Sum. Ass. 1803, cor. Macdonald, C. B.; Channon *v.* Patch, 5 B. & C. 893.

(*f*) Berriman *v.* Peacock, 9 Bing. 384.

(*g*) Holder *v.* Coates, Moo. & M. 112; 2 Selw. N. P. 1244 (13th ed.).

(*h*) Waterman *v.* Soper, 1 Ld. Raym. 737; Masters *v.* Pollie, 2 Roll. Rep. 141; Anon., Id. 255.

(*i*) Wyndham *v.* Way, 4 Taunt. 316; Penton *v.* Robert, 2 East, 90.

than could be dealt with in his trade, even though they are producing fruit (*k*). A tenant, not being a gardener, *cannot remove a border of box planted on the demised premises by himself, unless by special agreement with his landlord (*l*). A tenant of a garden may not plough up and destroy the strawberry beds, although he paid the preceding tenant for them (*m*). [*618]

Windfalls. — Windfalls of sound timber trees belong to the landlord, but windfalls of trees which are not timber, and of decayed timber trees, belong to the tenant (*n*). The same rule will apply to trees severed by the act of a trespasser.

(c) *Express Contracts as to Trees.*

Exceptions and Reservations of trees, &c. — The effect and construction of exceptions and reservations (in a demise) of trees, &c., have been already considered (*o*). Woods, which were excepted out of the lease, but subsequently granted by the lessor to the lessee, have been held not to pass by an assignment of the lease (*p*).

Construction of covenants as to trees, &c. — A covenant not to remove or grub up trees is broken by removing trees from one part of the premises to another: and so it is by taking away trees, even if the lessee plant a greater quantity than he takes away, unless those taken away were dead (*q*). A covenant to keep all the trees standing in an orchard, whole and undefaced, "reasonable use and wear only excepted," is not

(*k*) Wardell *v.* Usher, 3 Scott. N. R. 508.

(*l*) Empson *v.* Soden, 4 B. & Adol. 655.

(*m*) Wetherell *v.* Howells, 1 Camp. 227.

(*n*) Herlakenden's case, 4 Coke, 62; Countess of Shrewsbury's case, Moore, 812. And see Channon *v.* Patch, 5 B. & C. 897. In that case a lessor during the term cut down some oak pollards which were unfit for timber, and it was held that as a tenant for life or years would have been entitled to them, if they had been blown down, the lessor could not, by wrongful severance, acquire any right to them. As to right of reversioner and tenant for life, see Bewick *v.* Wingfield, 3 P. Wms. 268; Legge *v.* Legge, 32 Beav. 509; 33 L. J., Ch. 116, in which latter case it was held that the proceeds of windfalls must be invested and dealt with as part of the corpus of the settled estate.

(*o*) *Ante*, 178; see also Smith L. & T. 133—136 (2nd ed.).

(*p*) Godb. 188.

(*q*) Doe *d.* Wetherell *v.* Bird, 6 C. & P. 195; 2 N. & M. 285.

broken by cutting down trees past bearing, provided the landlord is likely to get back the premises at the end of the term in an improved condition (*r*); but a covenant to leave all the timber which is growing on the land when the lessee took it, is broken if, at the end of the term, he cut it down, but leave it there, for that would be defeating the intent of the covenant, although a literal performance of it (*s*). A lease was granted of a farm, and quarries of stone thereon, with liberty to work the quarries; out of this demise were reserved timber saplings and underwood growing on the premises: there was a covenant not to commit waste by cutting down saplings or underwood: it was held that the cutting down saplings and underwood for the necessary purpose of working a quarry on the premises was no breach of the covenant, there being no excess of the right [*619] that it was intended the tenant should *exercise (*t*).

Where there was a liberty in a lease, for the lessee to cut down and dispose of all timber and coppice, and also a proviso to give notice in writing to the lessor of his intention, that the latter might have the option of purchasing; and the lessee gave a bonâ fide notice, and the lessor disclaimed any intention of purchasing; it was held that the lessee might afterwards proceed to cut down the whole, without giving a fresh notice, at such seasons as suited his convenience, even though the lessor had in the meantime parted with his interest to another (*u*).

(d) *Waste as to Trees.*

For what purpose trees may be cut without waste. — A tenant who is answerable for waste only, may cut down trees for the purposes of reparation without committing waste, either where the damage has accrued during the time of his being in possession, in the ordinary course of decay, or where the premises were ruinous at the time he entered; but if the

(*r*) Doe *d.* Jones *v.* Crouch, 2 Camp. 449.

(*s*) 1 Esp. N. P. 271.

(*t*) Doe *d.* Rogers *v.* Price, 8 C. B. 894.

(*u*) Goodtitle *d.* Luxmore *v.* Savile, 16 East, 87.

decay happened by his default, to cut down trees to do the repair would be waste. And if a tenant having cut down trees for reparations, sell them, and afterwards buy them again and employ them about necessary reparations, it is waste by the sale (*x*): so, although he cut for repairs, if upon turning out unfit they are exchanged for others which are so applied (*y*). But the tenant may not cut timber for repairs which his lessor has covenanted to do (*z*). It is not waste for a tenant to cut timber for necessary botes (*a*).

What acts amount to waste. — Cutting down, destroying, or topping all trees which are timber either by the general law or by the particular custom of the country, is waste; so is the doing of any act which has the effect of causing a decay of the wood; and cutting down willows, beech, birch, asp, maple, or any trees of that description, which, though not timber, afford a defence or shelter for the house, has been considered destruction. Upon the same principle, cutting down or destroying fruit trees growing in the garden or orchard is waste: but if such trees grow upon any of the ground which the tenant holds out of the garden or orchard, it is not waste (*b*): and it has been laid down, that suffering the germins, or young shoots springing from trees which have been felled, to be destroyed, is waste (*c*); and that if it be done after previous waste in felling the trees, is double waste (*d*). * Cutting down willows and leaving the shoots to shoot afresh, has been held not to be waste, unless they are a shelter to the house or a support to the bank of a stream (*e*). In most places tenants may cut all trees, whether timber or underwood, which have, under the denomination of seasonable wood or sylva cædua, been cut within twenty years, without being guilty of waste (*f*). The cutting of hornbeams, hazels, willows, sallows, though [*620]

(*x*) Co. Lit. 53 b, 220.

(*y*) Simmons *v.* Norton, 7 Bing. 640.

(*z*) Com. Dig. Pleader (3 O.), 14.

(*a*) Com. Dig. Pleader (3 M.), 12; Co. Lit. 53; Hob. 234; Fitz. N. B. 59 (N.); Archdeacon *v.* Jenner, Cro. Eliz. 604.

(*b*) Co. Lit. 53 a; Id., note (6).

(*c*) 2 Roll. Abr. 825; Gage *v.* Smith, Godb. 210.

(*d*) Fitz. N. B. 59.

(*e*) Phillips *v.* Smith, 14 M. & W. 589.

(*f*) Godb. 4; 2 Roll. Abr. 815.

of forty years' growth, is not waste, because they will never become timber (*g*). In some counties, especially in Kent, they are in the habit of cutting down wood as underwood, at twenty-six, twenty-eight, or thirty years, and which, if allowed to grow, would become valuable timber.

No waste by cutting down excepted trees. — Waste can only be committed of the thing demised, and therefore if trees be excepted out of a demise, waste cannot be committed by cutting them down; and ejectment cannot be maintained as for waste thereby committed in or upon the demised premises (*h*).

SECT. 8. — *Fixtures* (*i*).

(a) *Generally.*

Meaning of "fixtures." — The word "fixtures" is used by different writers to express different meanings, but it is always applied to articles of a personal nature which have been affixed to land (*k*). It is a modern word, and is not to be found in the Termes de la Ley (*l*). In its most extensive sense[1] it means anything annexed to the freehold in such a

(*g*) Godb. 4, pl. 6.

(*h*) Goodright *d.* Peters *v.* Vivian, 8 East, 190; see also Doe *d.* Rogers *v.* Price, 8 C. B. 894, in which it was held upon the construction of a lease of a farm with quarries, trees being excepted, and the lessee covenanting not to commit waste by cutting them down, the lessee might cut down to a reasonable extent for quarrying.

(*i*) The law of fixtures generally, not only as between landlord and tenant, but also as between other persons, is most ably treated of in Amos and Ferard on Fixtures (2nd ed., A.D. 1883). See also Brown on Fixtures (3rd ed., A.D. 1875), and the notes to Elwes *v.* Mawe in Smith's Leading Cases (8th ed., A.D. 1879).

(*k*) Amos & F. 1; Co. Lit. 53 a.

(*l*) Wiltshire *v.* Cotterell, 1 E. & B. 674; Sheen *v.* Rickie, 5 M. & W. 175; Elliott *v.* Bishop, 10 Exch. 507.

[1] **The law of fixtures in America.** — *Limited definition.* — A more limited and technical definition of fixtures is found in Amos and Ferard on Fixtures (3d ed. p. 2), which includes only such personal articles, permanently annexed to the realty, as are *removable without consent.*

Extended definition. — By the extended and popular definition as given by our author, fixtures are divisible into fixtures removable (that is, fixtures proper) and fixtures irremovable, the latter being such as cannot be removed, except by consent of the owner of the land.

All definitions exclude mere annexed chattels. — However substantially the

latter may be fastened to the realty, they differ from fixtures in the fact that they were not intended (*actually* or *presumably*) to be *permanently* annexed, and are in all respects personalty. It is extremely difficult sometimes to distinguish them from fixtures, especially since the *intention* to permanently annex is sometimes *presumed*, and thereby the chattel becomes either a removable or an irremovable fixture.

Things annexed to the realty, how divisible. — They are divisible into three classes; viz., fixtures proper (that is, removable fixtures), irremovable fixtures (that is, such as are unconditionally made part of the realty), and mere chattels (that is, such as are merely temporarily annexed, and do not become fixtures in any sense).

Importance of distinguishing between removable fixtures and mere annexed chattels. — It is important to keep in mind these distinctions, because *mere chattels*, however substantially annexed, are removable by all parties, and *removable fixtures* (usually) only by the tenant.

There is also in some states a difference in remedies if removal is prevented by the landlord. Where removable fixtures (before severance) are held to be real estate, the remedy differs from that which prevails where they are held to retain their chattel nature.

In states where removable fixtures are held to retain their chattel nature, they differ from ordinary annexed chattels principally in the fact that they cannot (*ordinarily*) be removed by mortgagors or any other parties except tenants, being understood to be permanently annexed subject only to the right of removal.

Annexed chattels distinguished from fixtures. — A chattel attached to the realty, no matter how substantially, if without any intention, actual or presumed, of permanently annexing it remains a mere chattel, and is not a fixture in any sense of the term.

The character of the fastening is *evidence* of the intention, but not conclusive. Machinery fastened, *merely to keep it steady* during use, does not thereby become a fixture (Hubbell *v.* East Cambridge Five Cents Savings Bank, 132 Mass. 447); nor does *substantially* fastening it *necessarily* make it such (Adams *v.* Lee, 31 Mich. 440). Such chattels, though still annexed, may be replevied (Hubbell *v.* East Cambridge Savings Bank, *supra;* Corper *v.* Johnson, 143 Mass. 108); or their value may be recovered in an action of trover or other equivalent form of action (Hill *v.* Sewald, 53 Pa. St. 271; Tifft *v.* Horton, 53 N. Y. 377; Farrar *v.* Chauffetete, 5 Den. (N. Y.) 527; Guthrie *v.* Jones, 108 Mass. 191.)

Nature of removable fixtures. — A removable fixture, on the other hand (while still annexed), is by the English law, and by the law as it prevails in some of the American states, in theory at least, real estate. Amos and Ferard on Fixtures, pp. 28, 29. Accordingly in England it is not the subject of larceny (Id. p. 398); cannot be taken as a distress (Id. p. 386); and an action of trover will not lie for it (Id. p. 372, and cases cited).

Even in England, however, it is not for all purposes realty, for it may be seized on execution (Id. p. 393), and will pass by mortgage, sale, or descent as the personal property of the tenant.

In America there is a conflict of authority as to whether a removable fixture while still annexed retains its chattel nature, or assumes a real nature. In those states which hold that it assumes a real nature, the same inconsistent exceptions substantially exist as in England, the fixture not being really more than *quasi* realty, or having different natures under different circumstances. It is admitted in all the states that such fixtures may be seized on execution

as the personal property of the tenant (Ewell on Fixtures, p. 357; Lemar *v.* Miles, 4 Watts (Pa.) 330; Hey *v.* Bruner, 61 Pa. St. 87; Heffner *v.* Lewis, 73 Id. 302; Pillow *v.* Love, 5 Hayw. (Tenn.) 109; *contra* Pemberton *v.* King, 2 Dev. L. (N. C.) 376), and sold or mortgaged by him as personalty (Ewell on Fixtures, pp. 90, 91). Whether trover will lie for preventing the removal is a disputed point. In the following cases it was held that it would not lie, the decisions being placed upon the ground that removable fixtures while still annexed are real estate: Raddin *v.* Arnold, 116 Mass. 271 (Gray, C. J., said they were not mere chattels); Guthrie *v.* Jones, 108 Id. 191 (Morton, J., explains the difference between removable fixtures and chattels); Overton *v.* Williston, 31 Pa. St. 155 (Strong, J., said, "While the fixture remains attached, it is a part of the freehold"); Darrak *v.* Baird, 101 Id. 265. The last two above cases were placed upon two grounds, one being that the tenancy had terminated and with it the right of removal. They are both of them overruled by a later Pennsylvania case, as to the nature of a fixture in that state (see *infra*).

In the following cases it was held that trover would lie, and the decisions are placed upon the ground that such fixtures retain their chattel natures: Watts *v.* Lehman, 107 Pa. St. 106, overruling Darrak *v.* Baird and Overton *v.* Williston (Trunkey, J., said, "A fixture erected by a tenant on demised premises for the purposes of trade is personal property"); Globe Marble Mills Co. *v.* Quinn, 76 N. Y. 23; Wagner *v.* Clev. & Tol. R. R. Co., 22 Ohio St. 563; Stout *v.* Stoppel, 30 Minn. 56; Shapiria *v.* Barney, Id. 59.

It seems to be generally admitted that trover will lie for a building, even though substantially fixed to the realty, if the right of removal exists. Osgood *v.* Howard, 6 Greenl. (Me.) 452 (maintained against landlord); Adams *v.* Goddard, 48 Me. 212 (by lessee's vendee against landlord); Jewett *v.* Partridge, 12 Me. 243 (for building erected by consent on land of another); Russell *v.* Richards, 10 Id. 429; Tapley *v.* Smith, 18 Id. 12, 15 (*per* Weston, C. J.); Hilborne *v.* Brown, 12 Id. 162 (a blacksmith's shop standing on stone pillars); Smith *v.* Benson, 1 Hill (N. Y.) 176; Davis *v.* Taylor, 41 Ill. 405. In Cubbins *v.* Ayres, 4 Lea (Tenn.) 329, it was held that replevin would lie against the landlord for trade fixtures (a bar-room counter and shelving nailed to the floor, etc.) while still annexed.

Irremovable fixtures are parts of the realty. — Irremovable fixtures are, under all theories, parts of the realty. Richardson *v.* Copeland, 6 Gray (Mass.) 536, 537, 538; Winslow *v.* Merchants' Ins. Co., 4 Met. (Mass.) 306; Clary *v.* Owen, 15 Gray (Mass.) 522; Grosz *v.* Jackson, 6 Daly (N. Y.) 463 (chairs especially designed for a theatre, and screwed to the floor); Morgan *v.* Arthurs, 3 Watts (Pa.) 140; Oves *v.* Oglesby, 7 Id. 106; Wademan *v.* Thorp, 5 Id. 115 (Burr, millstones); Roberts *v.* Dauphin Deposit Bank, 19 Pa. St. 71; Christian *v.* Dripps, 28 Pa. St. 270; Morris's Appeal, 88 Pa. St. 368. Such fixtures cannot be seized and sold as chattels under a *fieri facias*. Voorhis *v.* Freeman, 2 W. & S. (Pa.) 116.

Same kind of articles fixtures or chattels, according to circumstances. — It must be remembered that the same kind of articles are frequently, under different circumstances, either removable fixtures, irremovable fixtures, or mere annexed chattels. The chief distinctions are in the nature of the things annexed, the character of the annexation, and the relation of the person annexing (as whether he is a tenant or otherwise).

Lists of things held fixtures or chattels are of some value; but unless (as is frequently not the case) the character of the things depends upon their own nature (as keys, doors, windows, etc.), such lists are in danger of misleading

unless the circumstances of the annexation are also stated. For example, a portable steam engine, a furnace, or a stove may be either a fixture or a chattel, according to circumstances.

Elements essential to the character of a fixture. — A union of three elements is everywhere held sufficient to constitute a fixture. In some states two of these are, under circumstances, held sufficient. These three are application to the purposes of the realty, actual annexation and intention (actual or presumed), to permanently annex. Runyon, Chan., in Quinby *v.* Manhattan Cloth & Paper Co., 24 N. J. Eq. 260, 266; Rapallo, J., in McRea *v.* Cent. National Bank, 66 N. Y. 489; Bartley, C. J., in Teaff *v.* Hewitt, 1 Ohio St. 511. Upon the necessity and degree of actual annexation there is a conflict of authorities, giving rise to three different American theories described later.

The intention to permanently annex. — This is regarded as one of the most important elements. Amos and Ferard in their treatise on the Law of Fixtures (3d ed.) p. 19, say that the authorities seem "to lead to the conclusion that where articles are in any way annexed to the realty, with a view to its better enjoyment during the interest of the person annexing them, they become fixtures." The intention to permanently annex may be presumed (Shaw, C. J., in Winslow *v.* Merchants' Ins. Co., 4 Met. (Mass.) 306), and will be sometimes (in favor of a mortgagee, vendee, or other innocent party), *contrary to the expressed intentions* (Southbridge Sav. Bank *v.* Exeter Works, 127 Mass. 542; Ridgeway Stove Co. *v.* Way, 141 Id. 557) of the party annexing. The question of intention is a mixed question of law and fact (*per* Morton, J., in Turner *v.* Wentworth, 119 Mass. 459), and sometimes is correctly determined by ascertaining the actual intentions of the party annexing.

Constructive annexation. — By all authorities such articles as, by their nature, are essential parts of the realty are held constructively annexed, although not actually attached to it. Among such articles are doors, windows, locks, keys, and rings of a house, deeds, deer in a park, fish in a pond, doves in a dovehouse, a Virginia fence, &c. *Per* Cowen, J., in Walker *v.* Sherman, 20 Wend. (N. Y.) 646; Bigelow, J., in Park *v.* Baker, 7 Allen (Mass.) 78; Shaw, C. J., in Winslow *v.* Merchants' Ins. Co., 4 Met. (Mass.) 306, 314, &c.

This doctrine has a broader application in some courts to include articles quite capable of a separate existence if especially adapted to the realty, and evidently intended to be permanently connected with it.

Annexation of severable chattels. — On the other hand, annexation of chattels entirely distinct in their character, as in the case of mirrors, wardrobes, or other heavy articles of furniture, though screwed to the walls, does not (*per* Shaw, C. J., in Winslow *v.* Merchants' Ins. Co., 4 Met. (Mass.) 306) make them fixtures. The presumed intention in such cases would be lacking.

How far is actual annexation essential? — *English theory.* — It is held in England that actual physical annexation is *in all cases essential, except* in cases of the *constructive* annexation of articles by nature essential to the realty. Amos and Ferard on Fixtures, pp. 240, 241.

American theories. — There are three distinct theories upon this point in America, by two of which actual annexation is always required, except in a *limited* class of cases of constructive annexation.

First American theory as to annexation. — By this theory actual annexation is always required, except in cases where the articles are by their nature constructively annexed (as is the case with doors, windows, keys, &c.); and the annexation must be substantial, so that the article cannot be removed without either injury to itself or to the structure to which it is affixed.

This theory prevails in *Vermont* and *Connecticut* and, doubtless, elsewhere.

Hill *v.* Wentworth, 28 Vt. 428, 433 (*per* Bennett, J., reviewing the Vermont cases); Tobias *v.* Francis, 3 Vt. 425 (holds that machinery simply connected by a band is not a fixture, even though not removable without being taken to pieces); Sturges *v.* Warren, 11 Vt. 433 (not so clear); Cross *v.* Marston, 17 Id. 533, 540; Swift *v.* Thompson, 9 Conn. 63 (a leading case); Baldwin *v.* Walker, 21 Id. 168, 183, 184 (*per* Church, Ch. J.); Capen *v.* Peckham, 35 Conn. 88, 96.

In Hackett *v.* Amsden, 57 Vt. 432, it was held that fencing not actually fastened to the ground was annexed. It is presumed that this case rests upon the doctrine of constructive annexation, and was not intended to overrule the previous Vermont cases.

Second American theory as to annexation. — By this theory actual physical annexation is always required (except in the cases of constructive annexation of things by nature essential to the realty); but slight annexation will be sufficient, provided the application to the purposes of the realty and the intention (actual or presumed) to permanently annex sufficiently appears.

An attachment merely for the purpose of keeping an instrument steady or in place for temporary use is not sufficient, but it must be for permanent purposes.

This theory prevails, among other states, in *New York*, *New Jersey*, and *Indiana*. Walker *v.* Sherman, 20 Wend. (N. Y.) 636 (a leading case, see exhaustive opinion of Cowen, J.; he cites contrary leading case of Stackpole *v.* Farrar, 6 Greenl. (Me.) 154, with disapproval, and, while admitting that such things as doors, windows, keys, &c., may be constructively annexed, decides that in all other cases there must be an actual physical attachment); McRea *v.* Cent. Nat. Bank, 66 N. Y. 489 (*per* Rapallo, J.); Quinby *v.* Manhattan Cloth & Paper Co., 24 N. J. Eq. 260, 266 (and Chan. Runyon said annexation need not be so substantial that it could not be removed without injury, but it must be more than an attachment merely to keep the instrument in place); Blancke *v.* Rogers, 26 Id. 563; Hamilton *v.* Huntley, 78 Ind. 521, 525 (Bicknell, C. C., explains the distinctions between the law in Maine, Massachusetts, Connecticut, New York and Indiana, saying that the Indiana cases follow those in New York).

In Snedeker *v.* Warring, 12 N. Y. 170, the court held that a statue of Washington of great heft and a sun-dial in yard of house, fastened only by their weight, but matching the house and fence, were sufficiently annexed to the realty. In a note to Minn. Co. *v.* St. Paul Co., 2 Wall. 609, 647, it is contended that Snedeker *v.* Warring overrules Walker *v.* Sherman (20 Wend. 636); but I do not think it is so understood in New York. It rests rather upon the admitted *but limited* application of the doctrine of constructive annexation recognized by Justice Cowen in Walker *v.* Sherman.

In Ohio it was said by Bartley, C. J., in Teaff *v.* Hewitt, 1 Ohio St. 511, 527, that it is an "essential requisite that the article be substantially annexed." Whether such is the law of Ohio, *quere*.

Third American theory as to annexation. — By this theory actual annexation is not in *all* cases essential if the existence of the other two elements (application to the realty and presumed intention) sufficiently appear.

The doctrine of *constructive* annexation is extended, under this theory, to include not only articles naturally connected with the realty, but such other articles as are essential to it, and intended, actually or presumptively, to be permanently annexed. Even by these authorities, the *fact* and *degree* of annexation are of great importance. They regard the absence of any annexation as, *ordinarily*, decisive that the article is a chattel, but consider it more

as *prima facie* than conclusive evidence, and that it may be overcome by other circumstances. This theory is of modern origin, and is said by Chief Justice Gibson (in Voorhis *v.* Freeman, 2 W. & S. (Pa.) 116, 119) to have started with Chief Justice Weston in Stackpole *v.* Farrar, 6 Greenl. (Me.) 154.

This theory prevails (among other states) in *Maine*, *Massachusetts*, *Pennsylvania*, *Iowa*, and (*perhaps*) in *New Hampshire*. Stackpole *v.* Farrar, 6 Greenl. (Me.) 154 (this case is a leading case; it decides that the mill chains, dogs, and bars of a saw-mill, being in their appropriate places, will pass by a deed of the realty); Strickland *v.* Parker, 54 Me. 263, 265 (*per* Kent, J., that permanent annexation has been abandoned as an absolute test); Voorhis *v.* Freeman, 2 W. & S. (Pa.) 116, 119 (a leading case, Gibson, C. J., cites Stackpole *v.* Farrar with approval, and Walker *v.* Sherman, 20 Wend. (N. Y.) 636, with disapproval); Pyle *v.* Pennock, 2 W. & S. (Pa.) 390; Winslow *v.* Merchants' Ins. Co., 4 Met. (Mass.) 306, 314 (decides that bands are a sufficient attachment to machinery placed in manufactory under presumed intention of permanently annexing them); Southbridge Sav. Bank *v.* Exeter Works, 127 Mass. 542 (a boiler not actually attached held to be a fixture); Allen *v.* Mooney, 130 Id. 155, and Ridgeway Stove Company *v.* Way, 141 Id. 557 (portable furnaces annexed only by their weight and connection with the pipes held fixtures); Ottumwa Woolen Mill Co. *v.* Hawley, 44 Iowa, 57.

In Despatch Line *v.* Bellamy Man. Co., 12 N. H. 205, 233, the court in New Hampshire (*per* Parker, C. J.) said that the character of the fastening as a criterion is of questionable authority, but considered Stackpole *v.* Farrar as carrying the doctrine of annexation to an extreme limit.

Tenant's rights distinguished. — They are distinguished from executors, remaindermen, mortgagors, and all other classes (*per* Bigelow, J., in Wall *v.* Hinds, 4 Gray (Mass.) 256, 270).

A mortgagor cannot remove fixtures. Butler *v.* Page, 7 Met. (Mass.) 40, 42; Winslow *v.* Merchants' Ins. Co., 4 Id. 306; Union Bank *v.* Emerson, 15 Mass. 159. There is no occasion (said Shaw, C. J., in Butler *v.* Page, *supra*) to adopt a liberal rule as to him, because if he redeems he has full benefit of the fixtures. He may, however, remove articles which retain their pure chattel nature, though annexed to the realty. Hill *v.* Wentworth, 28 Vt. 428; Bartlett *v.* Wood, 32 Id. 372; Fullam *v.* Stearns, 30 Id. 443.

Time of removal. — As a general rule, a tenant can only remove fixtures during the term. Stockwell *v.* Marks, 17 Me. 455; Dingley *v.* Buffum, 57 Me. 381; Harrison *v.* Smith, 19 Nova Scotia, 516; Cromie *v.* Hoover, 40 Ind. 49; Allen *v.* Kennedy, 40 Id. 142; Griffin *v.* Ransdell, 71 Ind. 440; Overton *v.* Williston, 31 Pa. St. 155; Darrak *v.* Baird, 101 Id. 265; Bliss *v.* Whitney, 9 Allen (Mass.) 115; State *v.* Elliott, 11 N. H. 540.

He may, however, remove them after the expiration of the term if prevented by the landlord from removing them earlier. *Ex parte* Hemenway, 2 Lowell, 496.

A tenant who renews a tenancy, by holding over, is entitled to remove fixtures during the year (*per* Lowell, J., in *Ex parte* Hemenway, *supra*, and Woodward, J., in Davis *v.* Moss, 38 Pa. St. 353); but a tenant cannot remove prior fixtures after he has taken a new lease (Watriss *v.* Nat. Bank, 124 Mass. 571; Loughran *v.* Ross, 45 N. Y. 792; Marks *v.* Ryan, 63 Cal. 107; Hedderich *v.* Smith, 103 Ind. 203).

The law as to agricultural fixtures in America. — Whether agricultural fixtures are removable in America is still an unsettled question.

In Van Ness *v.* Pacard, 2 Pet. 137, 143, 145, alluding to the doctrine of Elwes *v.* Mawes (3 East, 38 A. D. 1802, the leading case) that they are not

removable, expresses some doubt as to whether it is law in America; and this doubt has been repeated by other judges since, and some judges have expressly said that such fixtures are removable here. See Ewell on Fixtures, pp. 110 *et seq.*, and cases cited; Rogers, J., in White *v.* Arndt, 1 Whart. 94; Harris, J., in Dubois *v.* Kelly, 10 Barb. (N. Y.) 501; Rice, J., in Harkness *v.* Sears, 26 Ala. 493; Roberts, C. J., in McJunkin *v.* Dupree, 44 Tex. 500; Perkins *v.* Swank, 43 Miss. 349, 362.

Ewell says there does not seem to be any case between landlord and tenant in the United States overruling Elwes *v.* Mawes.

There have been a number of somewhat equivocal decisions, as that a cider-mill is removable (Holmes *v.* Tremper, 20 Johns. (N. Y.) 29); a cotton-gin and press (McJunkin *v.* Dupree, 44 Tex. 500); hop poles set in the ground (Wing *v.* Gray, 36 Vt. 261); and a padlock and loose boards used by a tenant to secure a corn house (Whiting *v.* Brastow, 4 Pick. (Mass.) 310). Some of the above cases may *perhaps* rest upon the theory that the articles were removable as being mere chattels, but not all of them.

Examples of chattels, removable fixtures and irremovable fixtures. — It is to be remembered that a slight variation of circumstances or a change of forum may make an article a fixture in one case, which is a chattel in another.

Nevertheless, the following table will throw considerable light upon the practical application of the foregoing rules.

1. *Trees* in an orchard are irremovable fixtures or parts of the realty. Mitchell *v.* Billingsley, 17 Ala. 391.

Trees in a nursery are held in Massachusetts to be chattels. Miller *v.* Baker, 1 Met. (Mass.) 27; Whitmarsh *v.* Walker, Id. 313. In Connecticut and Iowa, as between mortgagor and mortgagee, they are irremovable fixtures. Maples *v.* Millon, 31 Conn. 598; Price *v.* Brayton, 19 Iowa, 309. As between landlord and tenant, they are sometimes considered trade fixtures (*per* White, C. J., in Wagner *v.* Clev. & Tol. R. R. Co., 22 Ohio St. 563, 577; Cole, J., in Price *v.* Brayton, 19 Iowa 309); and sometimes chattels (Miller *v.* Baker, 1 Met. (Mass.) 27).

Fences. — Fences enclosing a field, whether actually or only constructively annexed, are irremovable fixtures (Mitchell *v.* Billingsley, 17 Ala. 391; Rowand *v.* Anderson, 33 Kans. 264; Smith *v.* Carrol, 4 G. Greene (Iowa), 146; Hackett *v.* Amsden, 57 Vt. 432; Walker *v.* Sherman, 20 Wend. (N. Y.) 636 (*per* Cowen, J., that a Virginia fence is constructively annexed)); but rails not laid in a fence are personal property (Robertson *v.* Phillips, 3 G. Greene (Iowa), 220). In Pennybecker *v.* McDougal, 48 Cal. 160, it was held that a portable fence, resting wholly on the surface, was a chattel.

Buildings. — Buildings are ordinarily parts of the realty, or irremovable fixtures. Sherboneau *v.* Beaver Mut. Fire Ins. Co., 33 Q. B. (Ont.) 1, and 30 Id. 472; Gardiner *v.* Parker, 18 Chy. (Ont.) 26; Stillman *v.* Hamer, 7 How. (Miss.) 421; Westgate *v.* Wixon, 128 Mass. 304; Burnside *v.* Twitchell, 43 N. H. 390; Powers *v.* Dennison, 30 Vt. 752; Humphrys *v.* Newman, 51 Me. 40; Linahan *v.* Barr, 41 Conn. 471; Pea *v.* Pea, 35 Ind. 387; Kennard *v.* Brough, 64 Id. 23; Prince *v.* Case, 10 Conn. 375, 379; Murphy *v.* Marland, 8 Cush. (Mass.) 575; Hutchins *v.* Shaw, 6 Id. 58; Osborne *v.* Humprey, 7 Conn. 335; Benedict *v.* Benedict, 5 Day (Conn.) 464.

Under some circumstances they have been held to be trade fixtures, and as such are removable by the tenant; viz., a dwelling-house (though having cellar of stone or brick) used as an accessory to the dairy business (Van Ness *v.* Pacard, 2 Pet. 137); a railroad depot (Western N. C. *v.* Deal, 90 N. C. 110; Carr *v.* Georgia R. R., 74 Ga. 73 (*per curiam*)); a ball-room (Ombony

v. Jones, 19 N. Y. 234); a hotel (Gray v. McLennan, 3 Manitoba, 337); an ice-house (Antoni v. Belknap, 102 Mass. 193); an engine-house (White's Appeal, 10 Pa. St. 252).

Buildings. — If the buildings are not trade fixtures, and have been erected by tenant without a special agreement (express or implied) with the landlord, they become parts of the realty, and belong to the landlord. Kutter v. Smith, 2 Wall. 491; Schlemmer v. North, 32 Mo. 206; Osborne v. Humphrey, 7 Conn. 335; Leland v. Gassett, 17 Vt. 403 (or occupant); Fisher v. Saffer, 1 E. D. Smith (N. Y.) 611 (or erected by any one having a precarious tenure). But if such buildings rest upon rollers (Robinson v. Wright, 2 MacArthur, 54); or upon blocks (Pennybecker v. McDougal, 48 Cal. 160; Lamphere v. Lowe, 3 Neb. 131; but *contra* Reid v. Kirk, 12 Rich. L. (S. C.) 54); or are easily removable (*per* Daly, J., in Fisher v. Saffer, 1 E. D. Smith, 611); or are attached merely by weight (Cole v. Roach, 37 Tex. 413; Tyler v. Decker, 10 Cal. 435); or if the buildings are portable (O'Donnell v. Hitchcock, 118 Mass. 401; Taylor v. Watkins, 62 Ind. 511), they are frequently held to be mere chattels, not only as between landlord and tenant, but as between mortgagor and mortgagee and between other parties.

In Bald v. Hagar, 9 C. P. (Ont.) 382, it was held that a frame-house, resting upon posts sunk into the ground, but not otherwise attached, was realty. In Hilborne v. Browne, 12 Me. 162, a blacksmith's shop standing upon stone pillars was held to be personal property. In several cases buildings resting upon foundations in some parts let into the ground have been held to be parts of the realty. Gasco v. Marshall, 7 Q. B. (Ont.) 193; Cleaver v. Culloden, 14 Id. 491. In Landon v. Platt, 34 Conn. 517, it was held that a barn resting upon stone piers was realty.

It is well established in most of the American states that buildings erected by one upon land of another, whether tenant or otherwise, however substantially annexed, may, by contract (express or implied), be made personal property as between the parties. Fuller v. Tabor, 39 Me. 519; Dame v. Dame, 38 N. H. 429; Griffin v. Ransdell, 71 Ind. 440; Yater v. Mullen, 24 Id. 277; Parker v. Redfield, 10 Conn. 490; Curtis v. Hoyt, 19 Id. 154; Melhop v. Meinhart, 70 Iowa, 685; District Township of Corwin v. Moorehead, 43 Iowa, 466.

In Wells v. Banister, 4 Mass. 514, and Taylor v. Townsend, 8 Id. 411, the right of removal seems to have rested upon an implied contract; and in Ashmun v. Williams, 8 Pick. (Mass.) 402, the singular doctrine was declared that the building or interest in the same was personal property, but subject to attachment as real estate.

Furnaces. — Furnaces permanently fixed to the building are usually held fixtures (either removable or irremovable) (Main v. Schwarzwaelder, 4 E. D. Smith (N. Y.) 273); and though doubtless removable by the tenant as domestic fixtures, yet if annexed so firmly that they cannot be removed without material injury to the building, even he cannot remove them (Stockwell v. Marks, 17 Me. 455).

Whether a portable furnace is a fixture is a mixed question of law and fact. It was held to be in Allen v. Mooney, 130 Mass. 155; Ridgeway Stove Company v. Way, 141 Mass. 557; Stockwell v. Campbell, 39 Conn. 362; and Towne v. Fiske, 127 Mass. 125; and not to be in Turner v. Wentworth, 119 Mass. 459.

Stoves. — A stove may be a fixture (Blethen v. Towle, 40 Me. 310), though if sold to lessee it is removable by the latter (Folsom v. Moore, 19 Id. 252).

Stoves packed away are certainly not fixtures. Blethen *v.* Towle, 40 Me. 310.

A fire-frame fixed in common fireplace is removable during the tenancy, but not afterwards. Gafield *v.* Hapgood, 17 Pick. (Mass.) 192, 193.

Gas fixtures and fittings. — These are removable if annexed by the tenant, either as being chattels or removable fixtures. Wall *v.* Hinds, 4 Gray (Mass.) 256; Lawrence *v.* Kemp, 1 Duer (N. Y.) 363; Rogers *v.* Crow, 40 Mo. 91; Hays *v.* Doane, 11 N. J. Eq. 84, 96.

As to whether they are chattels or fixtures between other parties than landlord and tenant, there is a distinction sometimes made between gas fixtures and gas fittings. The pipes connecting with the street main (called gas fittings) have been considered realty, while the chandeliers, side brackets, &c., considered personalty. Vaughan *v.* Haldeman, 33 Pa. St. 523 (and *per* Read, J.).

It was held that gas fixtures are personalty in McKeage *v.* Hanover Fire Ins. Co., 81 N. Y. 38; Montague *v.* Dent, 10 Rich. L. (S. C.) 135. In Hays *v.* Doane, 11 N. J. Eq. 84, 96, it was said by Williamson, Chan., that gasometers and apparatus to generate gas are not removable as between a grantor and grantee. On the other hand, in Johnson *v.* Wiseman, 4 Metc. (Ky.) 357, gas chandeliers screwed to iron pipes were held to be fixtures.

Water-pipes are removable (Wall *v.* Hinds, 4 Gray (Mass.) 256) by the tenant.

Mirrors screwed to the walls are chattels (McKeage *v.* Hanover Fire Ins. Co., 81 N. Y. 38); likewise *bedsteads, wardrobes, sideboards, book-cases,* &c. (Park *v.* Baker, 7 Allen (Mass.) 78).

A church organ as between vendor and vendee is a fixture (Rogers *v.* Crow, 40 Mo. 91); likewise a *bath-tub* and *lead water-pipes* (Cohen *v.* Kyler, 27 Mo. 122).

Fixtures of a *bar-room* (counter and attachments) are trade fixtures or chattels. *Ex parte* Hemenway, 2 Lowell, 496.

Stills have been held to be chattels. Crenshaw *v.* Crenshaw, Ex'r., 2 Hen. & Mun. (Va.) 22.

A smutter of a grist-mill is a fixture and passes by sale as real estate. Stillman *v.* Flenniken, 58 Iowa, 450.

Likewise a *factory bell* hung in a tower (Alvord Carriage M'f'g Co. *v.* Gleason, 36 Conn. 86), but a *plantation bell* was held removable in Cole *v.* Roach, 37 Tex. 413.

Rolling stock is sometimes held to be a fixture (Farmers Loan & Tr. Co., 25 Barb. 484; Minn. Co. *v.* St. Paul Co., 2 Wall, 609), and sometimes to be personal property.

Miscellaneous examples of trade fixtures, or chattels: *hop poles* set in ground (Wing *v.* Gray, 36 Vt. 261); *cotton-gin and press* (McJunkin *v.* Dupree, 44 Tex. 500); but a cotton-gin erected in a house and fastened with nails and braces was held an irremovable fixture as between vendor and vendee (Degraffenreid *v.* Scruggs, 4 Hump. (Tenn.) 451; Fairis *v.* Walker, 1 Bailey (S. C.) 540); a *cistern* (Wall *v.* Hinds, 4 Gray (Mass.) 256, removable by tenant, but held a fixture in Cole *v.* Roach, 37 Tex. 413); a *stone* brought into door-yard to be used as a step is until put in place a chattel (Woodman *v.* Pease, 17 N. H. 282); *shelving* and *counters* are trade fixtures or chattels (Laidlaw *v.* Taylor, 2 Russ. & Geld. (N. S.) 155; *Ex parte* Morrow, 1 Low. 386, 387); *sinks* and *piping* and *water-pipes* (Same *v.* Same and Wall *v.* Hinds, 4 Gray (Mass.) 256); an *ice-chest* (Park *v.* Baker, 7 Allen (Mass.) 78, though so large that it could not be removed without taking it to

pieces); *blacksmith's tools*, including boring lathe, engine lathe, wood-turning lathe press, drill press, punch, upright saw, circular saw, though propelled by water and though secured to building for purpose of steadying it (Bartlett *v.* Wood, 32 Vt. 372); *stone piers* of a railroad held to be trade fixtures (Wagner *v.* Clev. & Tol. R. R. Co., 22 Ohio St. 563); a *railroad track*, including rails, frogs, spikes, bolts, &c. (Northern Cent. Ry. Co. *v.* Canton Co., 30 Md. 347; Heffner *v.* Lewis, 73 Pa. St. 302), though as between mortgagor and mortgagee (State *v.* Northern Cent. Ry. Co., 18 Md. 193, 218), or owner and grantee under levy (Strickland *v.* Parker, 54 Me. 263), or grantee and third parties, is an irremovable fixture (Van Keuran *v.* Cent. R. R. Co., 38 N. J. L. 165); and a *grain elevator* has been held to pass as personalty under execution sale (Walton *v.* Wray, 54 Iowa, 531, 534).

A statue of Washington of great size, standing in yard and matching the building and fence was held part of the realty in Snedeker *v.* Warring, 12 N. Y. 170.

Machinery.— In the majority of cases as between landlord and tenant, machinery is removable as being trade fixtures. It may, however, be so firmly fixed to the realty that it cannot be separated without material injury to the structure and in such case is a part of the realty and not removable.

The rules previously given as to annexation, intention and application to the purposes of the realty determine whether an article is a fixture or a chattel and show considerable variance in the different states; this variance being especially manifested in the case of machinery. In general it may be said that the permanent driving machinery of a building erected especially for a mill or factory is held to be a part of the realty, subject, of course, to the local rules as to necessity and degree of actual annexation, which would prevent even *such* machinery from being a fixture in Vermont and Connecticut, unless it were firmly fastened in, and in New York, New Jersey and Indiana, unless it were slightly attached; but which in Maine, New Hampshire (probably), Massachusetts, Pennsylvania and Iowa, would require no actual attachment at all. Despatch Line *v.* Bellamy Man. Co., 12 N. H. 204; Pierce *v.* George, 108 Mass. 78; McLaughlin *v.* Nash, 14 Allen (Mass.) 136; Powell *v.* Monson, 3 Mason, 459, 464; Winslow *v.* Merchants' Ins. Co., 4 Met. (Mass.) 306; McRea *v.* Cent. Nat. Bank, 66 N. Y. 489; Moore *v.* Valentine, 77 N. C. 188; Lapham *v.* Norton, 71 Me. 83; Parsons *v.* Copeland, 38 Id. 537; Richardson *v.* Copeland, 6 Gray (Mass.) 536; Murdock *v.* Gifford, 18 N. Y. 28 (*per* Johnson, Ch. J.); Bass Foundry *v.* Gallentine, 99 Ind. 525; Hamilton *v.* Huntley, 78 Id. 521; Pemberton *v.* King, 2 Dev. L. (N. C.) 376; Sparks *v.* State Bank, 7 Blackf. (Ind.) 469.

In Connecticut (Swift *v.* Thompson, 9 Conn. 63), the machinery of a cotton factory not substantially fastened is a mere chattel.

The smaller or less permanent machinery, if capable of separate use, and only fastened so as to steady it for use, is quite frequently held to be mere chattels. Despatch Line *v.* Bellamy Man. Co., 12 N. H. 204; McLaughlin *v.* Nash, 14 Allen (Mass.) 136 (such as a portable steam engine, boiler, planing machine, anvils, grindstone on movable frame, emery machine, &c.); Holbrook *v.* Chamberlin, 116 Mass. 155 (a portable wood-cutting machine); Pierce *v.* George, 108 Id. 78 (lathes fastened to bench by screws, grindstones, rattler and frames, tack machines, slitter, anvils, vises and portable forge); Vanderpool *v.* Van Allen, 10 Barb. 157 (machinery for carding, spinning, twisting, balling, preparing and packing cotton yarn and twine); Hendy *v.* Dinkerhoff, 57 Cal. 3; Taffe *v.* Warnick, 3 Blackf. (Ind.) 111; Walker *v.* Sherman, 20 Wend (N. Y.) 636 (movable machinery of a woollen factory);

manner as to become parcel of it. But as between landlord and tenant it has generally a more confined meaning (*m*), and may be divided into — 1. Tenant's fixtures; 2. Landlord's fixtures.

"Tenant's fixtures." — "Tenant's fixtures" are personal chattels annexed to the freehold by the tenant during the term, either for the purpose of his trade (*n*), or for mere ornament and convenience (*o*) and which he has a right to [*621] sever and remove * during the term, in the absence of any express stipulation (*p*), or local custom to the contrary.

"Landlord's fixtures." — "Landlord's fixtures" are those put up by the landlord before or during the term, or by any previous owner or tenant, or by any other person. The term also includes such fixtures put up by the tenant during the term as the tenant has no right to remove. All these constitute part of the freehold, and also part of the premises demised. In a more confined sense "landlord's fixtures" mean those fixtures which are on the premises at the time of the lease, and are demised therewith, and are usually specified in a schedule to the lease or agreement (*q*), to which may be added such erections and fixtures subsequently added by the tenant which he is not entitled to remove during the term.

Examples. — Sometimes machinery and other articles, and even buildings, may be so erected as not to be let into the soil, or annexed to it or to any building in such a manner as to become part of the freehold, or to lose their chattel character.

Barns, &c. — Barns, granaries, sheds, or mills erected upon blocks, rollers, pattens, pillars, or plates, resting on brick-

(*m*) Amos & F. 2; Hallen *v.* Runder, 1 C., M. & R. 266; Elliott *v.* Bishop, 10 Exch. 508; *Ex parte* Barclay, 5 De Gex, M. & G. 403; 25 L. J., Bkt. 1.

(*n*) *Post*, 626.
(*o*) *Post*, 629.
(*p*) *Post*, 637.
(*q*) *Ante*, 183.

Murdock *v.* Gifford, 18 N. Y. 28 (looms in a woollen factory); Cresson *v.* Stout, 17 Johns. (N. Y.) 116 (machines for spinning and carding flax and tow).

Shingle machines and clapboard machines have been held fixtures in Maine. Corliss *v.* McLagin, 29 Me. 115.

work, but not affixed to the freehold by being let into it, or united to it by mortar, nails, or otherwise, are not considered as fixtures, but only as chattels, and may be removed by a tenant during his term, notwithstanding they have sunk into the ground by their own weight (*r*). But a wooden windmill resting by its weight on a brick foundation does not constitute part of the freehold (*s*). So a wooden barn erected by a tenant on a foundation of brick and stone let into the ground, but the barn resting upon it by weight alone, is a mere chattel removeable by the tenant on the expiration of his term, and for which he may afterwards maintain trover (*t*). So sheds or buildings called *Dutch barns*, having a foundation of brickwork in the ground, and uprights fixed in and rising from the brickwork, and supporting the roof which was composed of tiles, and the sides open, have been held removeable (*u*), and so has a *varnish house* having a brick foundation let into the ground, and a chimney belonging to it, upon which a superstructure of wood used as a varnish manufactory, but merely placed upon a wooden plate laid upon the brick foundation (*x*), and a wooden stable standing upon blocks and rollers, or a shed standing upon brickwork let into the ground (*y*).

Stills. — Stills set in brickwork have been considered as fixed to the freehold, though vats supported by and resting on brickwork and timber, but not fixed in the ground, * were not (*z*). [*622]

Salt-pans. — Iron salt-pans fixed with mortar to a brick floor, with furnaces under them may be removed by the lessees of salt springs (*a*); but where a lessee of salt springs was to pay rent according to the number of pans, and he covenanted to deliver up all *works* erected or to be erected at

(*r*) Huntley *v.* Russell, 13 Q. B. 572.

(*s*) Rex *v.* Otley, 1 B. & Ad. 161.

(*t*) Wansborough *v.* Maton, 4 A. & E. 884.

(*u*) Dean *v.* Allaley, 3 Esp. 11; cited in Elwes *v.* Mawe, 3 East, 47; 2 Smith L. C.; Amos & F. 37.

(*x*) Penton *v.* Robart, 4 Esp. 33; 2 East, 88; Amos & F. 39.

(*y*) Fitzherbert *v.* Shaw, 1 H. Blac. 258. In Martin *v.* Roe, 7 E. & B. 237, a rector was held entitled to remove hothouses without incurring liability for dilapidations.

(*z*) Horn *v.* Baker, 9 East, 215; 2 Smith L. C. 207 (7th ed.); but see Trappes *v.* Harter, 2 C. & M. 153; cited 6 Exch. 313.

(*a*) Lawton *v.* Salmon, 1 H. Blac. 259, n.

the end of the term; it was held that he could not remove iron salt-pans though merely resting on brickwork, and having iron rings in their sides, by which they were occasionally lifted up to be repaired (*b*). Where certain jibs, being parts of a machine, had been put up by the tenant during his term, and were capable of being removed without either injuring the other parts of the machine or the building, and had been usually valued between the outgoing and incoming tenant; it was held that these were the goods and chattels of the outgoing tenant, for which he might maintain trover (*c*). In all cases of this description, whatever may be the magnitude, or however substantial the nature of the erection, still if it is so constructed as not to be actually fastened to or let into the freehold, the tenant may always remove it, because the law considers it as a mere loose and moveable chattel (*d*).

Conservatory. — But a *conservatory* erected on a brick foundation, affixed to and communicating with rooms in a dwelling-house by windows and doors, cannot be removed by a tenant for years who erected it during his tenancy (*e*). So a *veranda*, the lower part of which is attached to posts fixed in the ground, cannot be removed (*f*). Nor greenhouses built in a garden, and constructed of wooden frames fixed with mortar to foundation walls of brickwork (*g*). Nor a boiler built into the masonry of a greenhouse, but it is otherwise with respect to the pipes of a heating apparatus connected with the boiler by screws (*g*). Gaseliers fixed to gas pipes cannot be removed; or, at all events, will pass by an assignment of the lease with all fixtures, &c. (*h*). It has been decided that an outgoing tenant has no right to remove pillars of brick and mortar *built* on a dairy floor to hold pans, although such

(*b*) Earl of Mansfield *v.* Blackburn, 6 Bing. N. C. 426.

(*c*) Davis *v.* Jones, 2 B. & A. 165; Sunderland *v.* Newton, 3 Sim. 450.

(*d*) Amos & F. 43; Hellawell *v.* Eastwood, 6 Exch. 312; Huntley *v.* Russell, 13 Q. B. 572; Wood *v.* Hewett, 8 Q. B. 913; Wansborough *v.* Maton, 4 A. & E. 884; Martin *v.* Roe, 7 E. & B. 237; Parsons *v.* Hind, 14 W. R. 860.

(*e*) Buckland *v.* Butterfield, 2 Brod. & B. 54; Amos & F. 76; and see West *v.* Blakeway, 2 M. & G. 729; 9 Dowl. 846.

(*f*) Penry *v.* Brown, 2 Stark. 403.

(*g*) Jenkins *v.* Gething, 2 Johns. & H. 520.

(*h*) Sewell *v.* Angerstein, 18 L. T., N. S. 300.

pillars are not let into the ground (*i*). It is necessary, in order to constitute a fixture, that the article in question should be let into or united with the land, or to some substance previously connected to the land. It is not enough that it has been laid upon the land, and brought into contact with it; something more than *mere juxta- [*623] position is required; as, that the soil shall have been displaced for the purpose of receiving the article, or that the chattel should be cemented, or otherwise fastened to some fabric previously attached to the ground (*k*). The screwing of a stocking-frame to the floor to keep it steady will not make it a fixture (*l*).

"Mules." — Cotton spinning machines called "mules," some of which were fixed by screws to the wooden floor, and some by screws which had been sunk into holes in the stone flooring, and secured by molten lead, *merely to steady them for more convenient use as machines*, continue to be chattels, and as such are distrainable for rent (*m*). Whether a machine or any other article has been so fixed and attached to the freehold as to become parcel of it, is a question of fact depending on the circumstances of each case, and principally on two circumstances; first, the mode of annexation to the soil or fabric of the house, and the extent to which it is united to them, whether it can easily be removed integrè, salve et commodè, or not, without injury to itself or the fabric of the building; secondly, on the object and purpose of the annexation, whether it was for the permanent and substantial improvement of the dwelling, in the language of the Civil Law, perpetui usûs causâ, or in that of the Year Book, per un profit del inheritance (*n*), or merely for a temporary purpose, or the more complete enjoyment and use of it *as a chattel* (*o*). If machines be attached slightly, by screws or otherwise, so as to be capable of removal without

(*i*) Leach *v.* Thomas, 7 C. & P. 327; and see Jenkins *v.* Gething, 2 Johns. & H. 520.

(*k*) Amos & F. 2; Wansborough *v.* Maton, 4 A. & E. 884; Huntley *v.* Russell, 13 Q. B. 572.

(*l*) Trappes *v.* Harter, 2 Cr. & M. 177; cited 6 Exch. 313.

(*m*) Hellawell *v.* Eastwood, 6 Exch. 295, 312.

(*n*) 20 Hen. 7, c. 13.

(*o*) Hellawell *v.* Eastwood, 6 Exch. 295.

the least injury to the fabric of the building or to themselves, and the object and purpose of the annexation was, not to improve the inheritance, but merely to render the machines steadier and more capable of convenient use as chattels, they do not become "fixtures" or part of the freehold, any more than a carpet would be which is attached to the floor by nails for the purpose of keeping it stretched out, or curtains, looking-glasses, pictures and other matters of an ornamental nature, which have been slightly attached to the walls of the dwelling-house *as furniture*, and which is probably the reason why they and similar articles have been held in different cases to be removeable (*p*). Machines so attached would pass to the executor as chattels rather than to the heir as part of the freehold (*q*). Fixtures which a tenant may sever from the freehold and take away during his term are not distrainable for rent (*r*): but machines which have not been [*624] sufficiently annexed to * constitute them part of the freehold are considered as mere goods and chattels, and may be so distrained (*s*).

Between what classes questions as to fixtures arise. — Questions respecting the right to what are ordinarily called *fixtures*, principally arise between three classes of persons: — 1st. Between different descriptions of representatives of the same owner of the inheritance: viz., between his *heir* and *executor*. In this first case, i.e. as between heir and executor, the rule obtains with the most rigour in favour of the inheritance, and against the right to disannex therefrom, and to consider as a personal chattel anything which has been affixed thereto. 2ndly. Between the *executors of tenant for life or in tail*, and *the remainderman or revisioner*, in which case the right to fixtures is considered more favourably for executors than in the preceding case between heir and executor. The third case, and that in which the greatest latitude and indulgence has always been allowed in favour of the claim to have any particular articles considered as per-

(*p*) Id.

(*q*) Trappes *v.* Harter, 3 Cr. & M. 177; cited 6 Exch. 313.

(*r*) Dalton *v.* Whittem, 3 Q. B. 961; Darby *v.* Harris, 1 Q. B. 895; *ante*, 438.

(*s*) Hellawell *v.* Eastwood, 6 Exch. 295.

sonal chattels as against the claim in respect of freehold or inheritance, is the case *between landlord and tenant* (*t*). Hence it may be received as a rule, that the decisions in favour of the executors of tenants for life, in tail, or in fee, as against the remainderman, reversioner, or heir, may in general be applied to cases between landlord and tenant, and are to be considered as governing authorities in support of a *tenant's* rights (*u*). But of course the converse does not hold.

General rule as to fixtures. — The general rule of law respecting fixtures is, that whatever is fixed to the freehold becomes part of it, and is subjected to the same rights of property as the land itself; the maxim being *Quicquid solo plantatur, solo cedit* (*x*). But the presumption that that which is annexed to the soil becomes part of the soil, may be rebutted by circumstances showing the intention of the parties to the contrary (*y*). Thus, where a chattel has been annexed by its owner to another's freehold, and may without injury be severed, it is not necessarily to be inferred from the annexation that such chattel becomes the property of the freeholder. Whether in a particular case it has become so or not, may be a question on the evidence; and the jury may infer, from user or other circumstances, an agreement, when the chattel was annexed, that the original owner should have liberty to take it away again at any time, and to use it in the meantime for the purposes of an easement (*z*). When the owner of the inheritance annexes thereto
* fixtures (which would in the ordinary case of land- [*625]
lord and tenant be removeable by the latter during his term), for a permanent purpose, and for the better enjoyment of his estate, they become part of the freehold (*a*). The principle upon which the rule of law, that fixtures pass

(*t*) *Per cur.* in Elwes *v.* Mawe, 3 East, 51; 2 Smith L. C. 162 (8th ed.).

(*u*) Amos & F. 28, 29, 73.

(*x*) Amos & F. 9; Minshall *v.* Lloyd, 2 M. & W. 459; Elliott *v.* Bishop, 10 Exch. 507, Martin, B.; Lancaster *v.* Eve, 5 C. B., N. S. 717, 720; 28 L. J., C. P. 235; Climie *v.* Wood, L. R., 3 Ex. 257, 260; 4 Id. 328; 37 L. J., Ex. 158; 38 Id. 223.

(*y*) Lancaster *v.* Eve, *supra*.

(*z*) Wood *v.* Hewett, 8 Q. B. 913; Lancaster *v.* Eve, 5 C. B., N. S. 717; 28 L. J., C. P. 235.

(*a*) Walmsley *v.* Milne, 7 C. B., N. S. 115; 29 L. J., C. P. 97; Fisher *v.* Dixon, 12 Cl. & F. 312.

with the soil, is relaxed in favour of trade, has no application where the parties who affix the machinery are themselves owners in fee of the soil (*b*). Nor where a conveyance or mortgage in fee is made of the building or land, to which trade or other fixtures are then or subsequently annexed (*c*). Even an assignment of a lease, with all fixtures, &c., will pass fixtures which the tenant might remove during the term (*d*).

General rule as to annexations. — The general rule of law, with respect to annexations made by a tenant during the continuance of his term, has been established from a very remote period (*e*). It is, that whenever the tenant has affixed anything to the demised premises during his term, he can never again sever it, without the consent of his landlord. The property, by being annexed to the land, immediately belongs to the freeholder; the tenant, by making it part of the freehold, is considered to abandon all future right to it, so that it would be waste in him to remove it afterwards. It therefore falls in with his term, and comes to the reversioner as part of the land. This is the rule recognized in the leading case of Elwes *v.* Mawe (*f*), in which case the tenancy was agricultural, and the tenant removed the fixtures which he had erected at his own expense, without doing damage to the freehold.

Exceptions to general rule. — But to this rule there are important *exceptions* with respect to fixtures erected by the tenant, (1) for mere ornament and convenience during his term (*g*), (2) for the purposes of his trade (*h*), and (3) by statute, under particular restrictions, for agricultural purposes (*i*). Whether the tenancy be for life, or for years, or from year to year, or only at will, makes no difference

(*b*) Mather *v.* Fraser, 2 K. & J. 536.

(*c*) Cullwick *v.* Swindell, L. R., 3 Eq. 249; 36 L. J., Ch. 173; Climie *v.* Wood, L. R., 3 Ex. 257; 37 L. J., Ex. 158; affirmed L. R., 4 Ex. 328; 38 L. J., Ex. 223; 20 L. T. 1012; Haley *v.* Hammersley, 3 De Gex, F. & J. 587; 30 L. J., Ch. 771.

(*d*) Sewell *v.* Angerstein, 18 L. T. 300.

(*e*) See Year Book, 17 E. 2, p. 518; Herlakenden's case, 4 Co. 64.

(*f*) 3 East, 51; 2 Smith L. C. 162 (7th ed.).

(*g*) *Post*, 629.

(*h*) *Infra*, 626.

(*i*) 14 & 15 Vict. c. 25, s. 3; Agricultural Holdings Act, 1883, s. 34.

with respect to his right to remove fixtures, nor whether he holds under a lease by parol, or by writing, or under seal (except as to any stipulations on the subject therein contained). It is, however, to be observed, that every case, in which there is a right of severing a thing from the freehold by virtue of the law of fixtures, is considered as an exception to the general rule (*k*). Fixtures which may be removed by the tenant during his term * constitute [*626] part of the freehold until severed therefrom (*l*). Until so severed they are not goods or chattels for which trover may be maintained (*m*). But sometimes a special action may be maintained for preventing a tenant or any person claiming under him from exercising his right to sever and remove the fixtures (*n*).

The exceptions to the general rule as to fixtures will be considered fully under the following heads, viz.: — 1. Fixtures for purposes of trade. 2. Fixtures for agricultural purposes. 3. Fixtures for ornament and convenience.

(b) *Fixtures for Purposes of Trade.*

Exception in favour of trade. — It is difficult to state the precise extent of the exception in favour of the removal of fixtures put up for the purposes of trade, so as to afford a safe guide as between landlord and tenant. "The old cases upon this subject," it is said in Penton *v.* Robart, "leant to consider as realty whatever was annexed to the freehold by the occupier; but in modern times the leaning has always been the other way, in favour of the tenant, in support of the interests of trade, which is become the pillar of the state. What tenant will lay out his money in costly improvements of the land, if he must leave everything behind him which can be said to be annexed to it? Shall it be said that the

(*k*) Buckland *v.* Butterfield, 2 Brod. & B. 54.

(*l*) Lee *v.* Ridson, 7 Taunt. 188; *ex parte* Lloyd, 1 Mont. & Ayr. 508.

(*m*) Green *v.* Cole, 2 Wms. Saund. 259 c, note (*r*) (6th ed.); Mackintosh *v.* Trotter, 3 M. & W. 184; Roffey *v.* Henderson, 17 Q. B. 574; Wilde *v.* Waters, 16 C. B. 637.

(*n*) London and Westminster Loan and Discount Co. (Limited) *v.* Drake, 6 C. B., N. S. 798, 811; 28 L. J., C. P. 297.

great gardeners and nurserymen in the neighbourhood of the metropolis, who expend thousands of pounds in the erection of greenhouses, hothouses, &c., are obliged to leave all these things upon the premises, when it is notorious that they are even permitted to remove trees, or such as are likely to become such, by the thousands, in the necessary course of their trade? If it were otherwise, the very object of their holding would be defeated" (*o*). The reason which induced the courts to relax the strictness of the old rules of law, and to admit an innovation in this particular instance, was, that the commercial interests of the country might be advanced, by the encouragement given to tenants to employ their capital in making improvements for carrying on trade, with the certainty of having the benefit of their expenditure secured them at the end of their terms: *the benefit of the public* may be regarded as the principal object of the law in bestowing this indulgence (*p*). Whenever the following circumstances concur (and sometimes when they do not all concur) the tenant may remove the article: viz., things which a [*627] tenant has fixed to the * freehold for the purposes of trade or manufacture may be taken away by him during his term, whenever the removal is not contrary to any express or implied stipulation in his lease or agreement (*q*), or the custom of the country (*r*), and the articles were of a perfect chattel nature before they were put up, or have in substance that character independently of their union with the soil, and may be removed without material injury to the freehold, and without losing their essential character or value (*s*). Thus if a lessee for years set up a furnace for his advantage, or a dyer make his vats and vessels to occupy his occupation ("*pour occupier son occupation*") during the term, he may remove them: and so of a baker (*t*). So a soap boiler, who for the convenience of his trade puts up

(*o*) Penton *v.* Robart, 2 East, 88.

(*p*) Lawton *v.* Lawton, 3 Atk. 14, 16.

(*q*) *Post*, 637.

(*r*) Culling *v.* Tuffnal, Bull. N. P. 34; Wetherell *v.* Howells, 1 Camp. 227; Davis *v.* Jones, 2 B. & A. 165; Amos & F. 44.

(*s*) Fisher *v.* Dixon, 12 Cl. & Fin. 312.

(*t*) Year Book, 20 Hen. 7, pl. 13.

vats, coppers, tables and partitions, may remove them during his term: or they may be taken under an execution against him (*u*). So a fire-engine or steam-engine set up by a tenant for the purpose of working a colliery may be removed by him during the term (*x*). Salt-pans erected by a tenant for the purpose of working salt-works let to him may be removed during the term (although it would be otherwise as between the heir and executor of a tenant in fee (*y*), unless there be an express covenant to leave the salt-works in good repair at the end of the term (*z*). "Coppers and all sorts of brewing vessels cannot possibly be used without being as much fixed as fire-engines; and in brew-houses especially, *pipes* must be laid through the walls and supported by the walls: and yet, notwithstanding this, as they are laid for the convenience of trade, landlords will not be allowed to retain them" (*a*); or rather, it should be said, the tenants may remove them during their tenancy. Though a building may be raised on a brick foundation, and have a brick chimney, yet if the erection of such foundation is of wood, and the building used for the purpose of trade or manufacture, the tenant may remove it before or at the end of his term (*b*). A steam-engine, to which a chimney necessarily belonged, has been held to be removeable (*c*). Where trustees, seised under a devise in fee of a farm leased to defendant (one of themselves) for a term, and afterwards, in the character of trustees only, conveyed the land to the plaintiff in fee, *with all fixtures:* it was held that defendant, being a party to the conveyance, could not, after the conveyance, under the * general [*628] law or custom of the country, remove at the expiration of his term farm machinery annexed to the land, and that he was therefore liable to plaintiff, who had demised to M., in case for injury to the reversion, for removing staddles

(*u*) Poole's case, 1 Salk. 368.

(*x*) Lawton *v.* Lawton, 3 Atk. 13; Ld. Dudley *v.* Ld. Warde, Ambler, 114.

(*y*) Lawton *v.* Salmon, 1 H. Blac. 259, n.; 3 Atk. 16, S. C.; Amos & F. 30, 339.

(*z*) Earl of Mansfield *v.* Blackburn, 6 Bing. N. C. 426.

(*a*) *Per* Ld. Hardwicke, C., in Lawton *v.* Lawton, 3 Atk. 15.

(*b*) Penton *v.* Robart, 2 East, 88; 4 Esp. 33.

(*c*) Ld. Dudley *v.* Ld. Warde, Ambler, 114; Bull. N. P. 34.

built into the land for the purpose of supporting ricks, and a threshing machine attached by bolts and screws to pillars fixed in the land, assuming that he might have removed them if they had been placed there by himself, and he had not joined in the conveyance; that a granary resting by its mere weight on staddles built into the land was a chattel, and would not be a fixture in the ordinary sense of the word, though it might pass by that word if, from the rest of the conveyance, an intention appeared of comprehending farm machinery in general: but that, even then, plaintiff could not recover against defendant for carrying it away, either as for an injury to the reversion in the land, the chattel not being part of such reversion, or in trover, M. being entitled to the exclusive possession of the chattel (*d*). The principle in favour of buildings erected for the purposes of trade has been extended to many buildings which come by no means strictly under the term; thus in the famous case of the cider-mill, although the mill was put up in part for the enjoyment of the real estate, yet as the making of cider was a species of trade, the mill was considered to fall within the general exception in favour of trade fixtures (*e*); but that case has been disapproved of by the House of Lords, and is not to be relied on (*f*). In the case of fire-engines and steam-engines in collieries, it was held that the getting and vending the coals so far partook of the nature of a trade, that the engines employed in the collieries might be deemed trading erections (*g*). But it has not yet been decided that a tenant may remove substantial and extensive additions to the premises, although he has built them exclusively for the convenience of trade — such as lime, pottery or brick kilns, wind or water mills, workshops, storehouses, furnaces and flues of smelting and glass-houses, stoves and floors of smelting-houses, and other erections of the like descriptions (*h*). The distinction is between *buildings* of a permanent nature

(*d*) Wiltshire *v.* Cottrell, 1 E. & B. 674.

(*e*) Lawton *v.* Lawton, 3 Atk. 14.

(*f*) Fisher *v.* Dixon, 12 Cl. & Fin. 312; Walmsley *v.* Milne, 7 C. B., N. S. 115; 29 L. J., C. P. 97.

(*g*) Lawton *v.* Lawton, 3 Atk. 14; Ld. Dudley *v.* Ld. Warde, Ambl. 114; Bull. N. P. 34; Minshall *v.* Lloyd, 2 M. & W. 450.

(*h*) Amos & F. 340.

and *machinery and fixtures* erected for the purposes of trade, the latter being removable, but the former not (*i*). It seems that the 14 & 15 Vict. c. 25, s. 3 (*k*), does not extend to buildings erected *only for the purposes of trade*. A reversionary interest in trade fixtures will pass to a purchaser under a parol agreement (*l*).

(c) *Fixtures for Ornament and Convenience.*

What erections may be removed. — Articles put up for ornament and convenience during the term have been long allowed to be taken away by the tenant at the expiration of his lease. They are considered rather as articles of fixed furniture, or of utility and domestic convenience, than as parts of the house or freehold (*m*); unless, indeed, the tenant leaves them annexed to the premises after the expiration of his term (*n*). Instances are to be found as far back as the Year Books (*o*): but the relaxation of the general rule in these instances is an indulgence, which is an exception only, and, though to be fairly considered, is not to be extended (*p*). It is a privilege of a more limited nature than that in respect of trade fixtures (*q*), although such distinction does not appear to have been taken in many of the early cases (*r*). The principle upon which this exception to the general rule is founded appears to be that, as annexations of this nature must be generally designed for temporary purposes only, it would greatly incommode tenants in the enjoyment of their estates, if by every slight attachment to the freehold the property should be immediately changed, and pass over to the reversioner (*s*). Fixtures for ornament or

(*i*) Whitehead *v.* Bennett, 27 L. J., Ch. 474; Foley *v.* Addenbrooke, 13 M. & W. 174.

(*k*) *Post*, 632.

(*l*) Petrie *v.* Dawson, 2 C. & K. 138.

(*m*) Amos & F. 71—93, 240—342; Birch *v.* Dawson, 2 A. & E. 37.

(*n*) Lyde *v.* Russell, 1 B. & Ad. 394.

(*o*) 8 Hen. 7, 12; 21 Hen. 7, 26; Day *v.* Austin, Owen, 70; Cro. Eliz. 374.

(*p*) *Per* Dallas, C. J., in Buckland *v.* Butterfield, 2 Brod. & B. 54; Amos & F. 93.

(*q*) Buckland *v.* Butterfield, *supra*; Leach *v.* Thomas, 7 C. & P. 327.

(*r*) Beck *v.* Rebow, 1 P. Wms. 94; Squier *v.* Mayer, 2 Freem. 249.

(*s*) Amos & F. (2nd ed.), 83; (3rd ed.), 116.

convenience cannot be removed where the erection may be deemed a permanent improvement, and cannot be conveniently detached and removed without material injury or damage to the house or freehold: thus a conservatory erected on a brick foundation, affixed to, and communicating with rooms in, a dwelling-house, by windows and doors, may not be removed by a tenant for years, who has erected it during his tenancy; although he has a reversion in fee after the death of his lessor (*t*). So a *veranda*, the latter part of which is attached to posts fixed in the ground, may not be removed (*u*). And upon the same principle it has been held that ranges, ovens and set pots, affixed to a house built by the person against whom an execution has issued, cannot be taken by the sheriff under a writ of fi. fa. (*x*). Window-sashes, which are neither hung nor beaded into the frames, but merely fastened by laths, nailed across the frames to prevent their falling out, are not fixed to the freehold (*y*): so a pump erected by a tenant during his term, and [*630] * very slightly affixed to the freehold, is removable as a tenant's fixture (*z*). A. bequeathed his leasehold messuage, with the grates, stoves, coppers, locks, bolts, keys, bells, and other fixtures and fixed furniture, to V. for life; and the household goods, furniture, plate, linen, china, books, wines and liquors, and other properties in the messuage, not being comprehended under the preceding terms fixtures and fixed furniture, to V. absolutely; there were in the messuage looking-glasses standing on chimney-pieces and nailed to the wall; and a book-case standing on (but not fastened to) brackets and screwed to the wall: it was held that V. took only a life interest in these (*a*). Erections of the description above mentioned also cannot be removed, if the removal would be of such a nature as to constitute waste, or if the premises could not be left in the same state as before the removal; at least the contrary of this was assigned by Lord

(*t*) Buckland *v.* Butterfield, *supra*; West *v.* Blakeway, 2 M. & G. 729; 9 Dowl. 846.

(*u*) Penry *v.* Brown, 2 Stark. 403.

(*x*) Wynne *v.* Ingleby, 5 B. & A. 625.

(*y*) Rex *v.* Hedges, 1 Leach, C. C. 201; 2 East, P. C. 590, n.

(*z*) Grymes *v.* Boweren, 6 Bing. 437.

(*a*) Birch *v.* Dawson, 2 A. & E. 37; 6 C. & P. 658.

Mansfield as a ground for removal, although the principle has not been adverted to in more modern decisions (*b*).

Summary of what may be removed. — The articles for ornament and convenience, which have been held to be removable, are: — hangings, tapestry and pier glasses, whether nailed to the walls or panels, or put up in lieu of panels (*c*); cornices (*d*); marble or other *ornamental* chimney-pieces (*e*); marble slabs (*f*); window blinds (*g*); wainscot fixed to the walls by screws (*h*), grates, ranges and stoves, although fixed in brickwork (*i*); iron backs to chimneys (*k*); beds fastened to the walls or ceiling (*l*); fixed tables (*m*); furnaces and coppers (*n*); pumps (*o*); mash-tubs and fixed water-tubs (*p*); coffee and malt-mills (*q*); cupboards fixed with hold-fasts (*r*); book-cases standing on brackets and screwed to the walls (*s*); clock cases (*t*); iron ovens and the like (*u*).

Fixtures are removable only where no damage to freehold. — It must, however, be remarked, that things can be removed only when the separation will occasion but little or no damage to the freehold or to the articles removed (*x*). The question whether a fixture * can be removed by [*631] a tenant without substantial injury to the premises is a question for the jury, upon an issue whether the fixture is removable or not by law. A plea to an action by a landlord

(*b*) Lawton *v.* Salmon, 1 H. Blac. 259, n.; 3 Atk. 16, n.

(*c*) Squier *v.* Mayer, 2 Freem. 249; 2 Eq. Cas. Abr. 430; Beck *v.* Rebow, 1 P. Wms. 94; Buckland *v.* Butterfield, 2 Brod. & B. 54.

(*d*) Avery *v.* Cheslyn, 3 A. & E. 75.

(*e*) Lawton *v.* Lawton, 3 Atk. 15; Lawton *v.* Salmon, 1 H. Blac. 260, n.; Allen *v.* Allen, Moseley, 113; Leach *v.* Thomas, 7 C. & P. 327; Bishop *v.* Elliott (in error), 11 Exch. 115, 120—122.

(*f*) Allen *v.* Allen, Moseley, 112; Amos & F. 249, 341.

(*g*) Amos & F. 110.

(*h*) Lawton *v.* Lawton, 3 Atk. 15; *Ex parte* Quincey, 1 Atk. 477; Ld. Dudley *v.* Ld. Warde, Ambler, 113; Lee *v.* Risdon, 7 Taunt. 191.

(*i*) Lee *v.* Risdon, 7 Taunt. 191; Rex *v.* St. Dunstan, 4 B. & C. 686.

(*k*) Harvey *v.* Harvey, 2 Stra. 1141; Amos & F. 74.

(*l*) *Ex parte* Quincey, 1 Atk. 477.

(*m*) Amos & F. 105.

(*n*) Squier *v.* Mayer, 2 Freem. 249.

(*o*) Grymes *v.* Boweren, 6 Bing. 437; 4 M. & P. 143; Amos & F. 80.

(*p*) Amos & F. 105.

(*q*) R. *v.* Londonthorpe, 6 T. R. 379.

(*r*) Rex *v.* St. Dunstan, 4 B. & C. 686.

(*s*) Birch *v.* Dawson, 2 A. & E. 37; 6 C. & P. 658.

(*t*) Amos & F. 105.

(*u*) Winn *v.* Ingleby, 5 B. & A. 625; Amos & F. 185, 342.

(*x*) Avery *v.* Cheslyn, 3 A. & E. 75; Leach *v.* Thomas, 7 C. & P. 327.

against his tenant for removing a cornice, stated that it was the property of the defendant; that it was fixed up by him with screws only, for the purpose of ornament; that he carefully removed it during the term, doing no unnecessary damage; and that he repaired all the damage done. The replication stated that it was affixed to the freehold of the house, and was not removable by law. Issue on that question: — held that it was not a misdirection to leave it to the jury to say whether they were of opinion that the cornice was ornamental, and was so affixed to the freehold that it could be removed without substantial injury; and that if they thought so, and that it had been so removed, the tenant had a right to remove it. The question whether removable by law or not is a mixed question of law and fact (*y*). If the damages caused by the removal would be insignificant, they would not prevent the removal. *De minimis non curat lex* (*z*). It appears, however, to have been generally understood in practice that where ornamental or other fixtures are taken down, the tenant is liable to repair the injury the premises may suffer by the act of removal; and, in like manner, that where a fixture has been put up in substitution for an article which was attached to the premises at the time of the demise, the tenant, in taking down his own fixture, is bound to restore the former article, or to replace it by another erection of a similar description (*a*).

(d) *Fixtures for Agricultural Purposes.*

No right of removal at common law. — At common law there never was any right on the part of the tenant to remove fixtures erected by him for merely agricultural purposes. So it was laid down in 1803 in the leading case of Elwes *v.* Mawe (*b*), in which it was held that a tenant, who had erected at his own expense, and for the more convenient occupation of his farm, a beast-house, carpenter's shop, fuel-house, cart-house, and fold-yard, all built of brick, tiled, and

(*y*) Avery *v.* Cheslyn, 3 A. & E. 75.

(*z*) Governors of Harrow School *v.* Alderton, 2 B. & P. 86.

(*a*) Martyr *v.* Bradley, 9 Bing. 24; Sunderland *v.* Newton, 3 Sim. 450.

(*b*) 3 East, 38; 2 Smith L. C. 162.

let into the ground, was liable to an action for waste for (during his term) removing the same, even though he left the premises in the same state as when he entered. The court was of opinion that the extension to agriculture of the established privilege in favour of trade would be an innovation, and contrary to the current of legal authorities on the subject.

*** Right to remove under 14 & 15 Vict. c. 25.** — [*632] This unjust rule was first sought to be remedied in 1851, by 14 & 15 Vict. c. 25, s. 3. By this section, "If any tenant of a farm or land shall, after the passing of this act, *with the consent in writing of the landlord* (*c*) for the time being, at his own cost and expense, erect any farm-buildings, either detached or otherwise, or put up any other building, engine, or machinery, *either for agricultural purposes or for the purposes of trade and agriculture* (which shall not have been erected or put up in pursuance of some obligation in that behalf), then all such buildings, engines, and machinery shall be the property of the tenant, and shall be removable by him notwithstanding the same may consist of separate buildings, or that the same or any part thereof may be built in or permanently fixed to the soil, so as the tenant making any such removal do not in anywise injure the land or buildings belonging to the landlord, or otherwise do put the same in like plight and condition, or as good plight and condition, as the same were in before the erection of anything so removed: provided, nevertheless, that no tenant shall, under the provision last aforesaid, be entitled to remove any such matter or thing as aforesaid without first giving to the landlord or his agent *one month's previous notice in writing* of his intention so to do (*d*); and thereupon it shall be lawful for the landlord, or his agent on his authority, to elect to purchase (*e*) the matters and things so proposed to be removed, *or any of them*, and the right to remove the same shall thereby cease, and the same shall belong to the landlord; and the

(*c*) See Form of Consent, *post*, Appendix C., No. 20.

(*d*) See Form of Notice, *post*, Appendix C., No. 22.

(*e*) See Form of Notice of Election, *post*, Appendix C., No. 23.

value thereof shall be ascertained and determined by two referees, one to be chosen by each party, or by an umpire to be named by such referees, and shall be paid or allowed in account by the landlord who shall have so elected to purchase the same." It is to be observed that this enactment is confined to buildings, engines, and machinery erected or put up by the tenant at his own cost and expense, either for agricultural purposes, or for the purposes of trade and agriculture, *with the previous consent in writing* of the landlord, and with respect to which the tenant has given to the landlord or his agent *one calendar month's previous notice in writing* of his intention to remove them during the tenancy, and that it does not apply to buildings, engines, or machinery erected *solely for the purposes of trade;* nor to articles affixed for mere ornament and convenience during the term.

Agricultural Holdings Act. — The Agricultural Holdings Act of 1875 in theory went far beyond the above act, giving the tenant, subject to certain rights of pre-emption and on the part of the landlord, the property in fixtures whether erected with the consent of the landlord or not, but as that act could be and in most cases was "contracted out [*633] of" by landlords, *the practical effect was very small. The Agricultural Holdings Act, 1883, has conferred the same rights in nearly similar terms to those used in the Act of 1875. This act also (as regards fixtures) can be excluded (see p. 635, post) by landlords, but neither does the act itself make special provision for such exclusion, nor is it believed has there been an exclusion in any large number of cases. Both acts are prospective only, the Act of 1875, applying to tenancies created between 14th February, 1876, and 1st January, 1884, and the Act of 1883, to tenancies created on or after 1st January, 1883.

Tenant's right to fixtures under Agricultural Holdings Act, 1875. — Sect. 53 of the act of 1875 (*f*) gives the tenant an

(*f*) The Act of 1875, 38 & 39 Vict. c. 92, applies, by sect. 56, to "every contract of tenancy [*i.e.* by sect. 4, to "every letting of land for a term of years or for lives, or for lives and years, or from year to year, or at will"] beginning after the commencement of the act [*i.e.* by sect. 2, the 14th February, 1876], unless the landlord and tenant agree in writing in the contract of tenancy, or otherwise," that the act, or any part of it,

absolute property in all fixtures "affixed" by him "to his holding," except steam-engines, in the following terms: — "Where after the commencement of this act [i.e. February 14th, 1876] a tenant affixes to his holding any engine, machinery, or other fixture, for which he is not under this act or otherwise entitled to compensation, and which is not so affixed in pursuance of some obligation in that behalf, or instead of some fixture belonging to the landlord, then such fixture shall be the property of and be removable by the tenant:

Provisoes. — "Provided as follows:

"1. **Payment of rent.** — Before the removal of any fixture the tenant shall pay all rent owing by him, and shall perform or satisfy all other his obligations to the landlord in respect of the holding:

"2. **Careful removal.** — In the removal of any fixture, the tenant shall not do any avoidable damage to any building or other part of the holding:

"3. **Compensation for damage.** — Immediately after the removal of any fixture, the tenant shall make good all damage occasioned to any building or other part of the holding by the removal:

"4. **Notice of removal to landlord.** — The tenant shall not remove any fixture without giving one month's previous notice in writing to the landlord of the intention of the tenant to remove it:

"5. **Option in landlord to purchase.** — At any time before the expiration of the notice of removal, the landlord, by notice in writing given by him to the tenant, may elect to purchase any fixture comprised in the notice of removal: and any fixture thus elected to be purchased shall be left by the tenant, and shall become the property of the landlord, who shall pay the tenant the fair value thereof to any incoming tenant

"shall not apply to the contract." As to tenancies current at the commencement of the act, if they be tenancies from year to year or at will, the act (by sect. 57) applies to them unless either party has excluded its operation by notice in writing, while if they be tenancies for any other term, the act does not apply to them at all.

[*634] of the holding: and any difference as to * the value shall be settled by a reference under this act (*g*) as in case of compensation (but without appeal):

"**Saving for steam-engine.** — But nothing in this section shall apply to a steam-engine erected by the tenant if, before erecting it, the tenant has not given to the landlord notice in writing of his intention to do so, or if the landlord, by notice in writing given to the tenant, has objected to the erection thereof."

Tenant's right to fixtures under Agricultural Holdings Act, 1883. — The Act of 1883, by sects. 1, 54, and 61, applies to the following holdings only:

"*Holdings, either wholly agricultural or wholly pastoral, or partly agricultural and partly pastoral, or wholly cultivated as market gardens, held under a landlord for a term of years or for lives, or for lives and years, or from year to year by a tenant holding no employment under such landlord*" (*h*).

To such tenants the 34th section of the act, repeating with no very considerable alterations the repealed 53rd section of the Act of 1875, gives an absolute property in fixtures as follows: —

"Where, after the commencement of this act, a tenant affixes to his holding any engine, machinery, fencing or other fixture, or erects any building for which he is not under this act or otherwise entitled to compensation, and which is not so affixed or erected in pursuance of some obligation in that behalf or instead of some fixture or building belonging to the landlord, then such fixture or building shall be the property of and be removable by the tenant before or within a reasonable time after the termination of the tenancy.

"Provided as follows: —

"1. Before the removal of any fixture or building the tenant shall pay all rent owing by him, and shall perform or satisfy all other his obligations to the landlord in respect of the holding:

(*g*) See Sects. 23—28 of the act, *post*, Appendix A., Sect. 8.

(*h*) Lely & Pearce's Agricultural Holdings, p. 18. See the application of the act discussed, *post*, Ch. XXI.

"2. In the removal of any fixture or building the tenant shall not do any avoidable damage to any building or other part of the holding:

"3. Immediately after the removal of any fixture or building the tenant shall make good all damage occasioned to any building or other part of the holding by the removal:

"4. The tenant shall not remove any fixture or building without giving one month's previous notice in writing to the landlord of the intention of the tenant to remove it:

"5. At any time before the expiration of the notice of removal, the landlord, by notice in writing given by him to the tenant, may elect to purchase any fixture or building comprised in the * notice of [*635] removal, and any fixture or building thus elected to be purchased shall be left by the tenant, and shall become the property of the landlord, who shall pay the tenant the fair value thereof to an incoming tenant of the holding; and any difference as to the value shall be settled by a reference under this act, as in case of compensation (but without appeal)."

Distinction between right under Act of 1875 and Act of 1883. — The only distinction between this section and the repealed 53rd section of the Act of 1875 are, (1) that the Act of 1883 applies to buildings, whereas the Act of 1875 did not; (2) that the Act of 1883 does not repeat the qualification as to steam-engines contained in the Act of 1875; and (3) that the Act of 1883 expressly provides that the fixtures may be removed before or within a reasonable time after the end of the tenancy.

Can sect. 34 of the Act of 1883 be "contracted out of"? That is, can the landlord in the contract of tenancy or otherwise agree with the tenant that the tenant shall not have the benefit of it, or have the benefit of it subject only to further conditions than the section itself imposes? It is submitted that he can. *Cuilibet licet renunciare juri pro se introducto.* Any person may waive a remedial law introduced for his own benefit; and this provision as to fixtures appears to have been

introduced for the benefit of the tenant as against the landlord, and upon no ground of public policy such as would bring into effect an exception to the general rule (*i*). Inasmuch, too, as the 55th section of the act avoids only contracts depriving a tenant of his right to claim *compensation*, it appears that the question of contracting out of the act was present to the mind of the legislature, and that the legislature deliberately abstained from avoiding contracts depriving the tenant of his right to fixtures also (*k*). If the section be contracted out of in the contract of tenancy itself, no consideration will be necessary, the tenancy itself being sufficient consideration; but if contract of tenancy made after the commencement of the act already subsist, and it be desired to avoid the effect of section 34, this cannot be done without a consideration moving from the landlord to the tenant; that is, the landlord must give the tenant something in return for the tenant's giving up his advantages under section 34.

Difficulties of construction. — The 34th section of the Act of 1883 presents considerable difficulties of construction. It will be seen that the fixtures become the property of and removable by the tenant, *provided* that the tenant observes four conditions, and that the landlord does not exercise an option of purchase.

Conditions of removal. — If the conditions be not observed, do the fixtures revest in the landlord, so that he can [*636] sue the tenant or a purchaser from the * tenant for them, or has he merely an action for damages against the tenant? It is submitted that in this respect, notwithstanding the practical hardship upon a purchaser, the section must be construed strictly in favour of the landlord, and that he may sue any person whatever in trover for fixtures severed in breach of the conditions.

"Other fixtures." — Another question is, whether the expression "other fixtures" includes ornamental or trade fixtures, or whether what is called the *ejusdem generis* rule is to operate so as to confine the operation of the expression to

(*i*) See Maxwell on Statutes (2nd ed.), p. 277, citing Taylor *v.* Phillips, 3 East, 155.

(*k*) See a similar opinion expressed in Amos and Ferard on Fixtures (3rd ed.), p. 93.

fixtures of the same kind with those already named, that is, agricultural fixtures. It is submitted that ornamental, but not trade, fixtures are included on the ground that for an agricultural tenant to have a house and ornamental fixtures therein might be considered to be in contemplation of the parties, whereas with trade fixtures it would be otherwise.

Time of removal. — It will be observed, that by the first paragraph of the section, the fixtures are removable "before or within a reasonable time after the termination of the tenancy." The curious and uncertain period of removability at common law is spoken of hereafter (*l*). The statute appears to substitute for it a still more uncertain period to be determined by what may be deemed by a jury, or a judge if a case should be tried by a judge alone, to be reasonable in fact, and it seems that within such period a tenant who has quitted has by force of the statute a power of re-entry for the purpose of removing the fixtures.

Independently of the above acts, the agricultural tenant is left to the operation of the rule in Elwes *v.* Mawe above referred to, so as to have no power of removal of agricultural fixtures (*m*).

Summary of what may be removed, at common law. — Although an agricultural tenant cannot remove articles which are strictly of an agricultural nature, yet, if the object and purpose of the erections relate partly to trade of any description, the tenant may remove them (*n*); thus cider mills (*o*), machinery for working mines and collieries (*p*), and salt pans (*q*), have been considered removable: nurserymen have been allowed to remove trees and shrubs which they have planted for the purpose of sale (*r*), but not to plough up strawberry beds out of the ordinary course

(*l*) *Post*, Sub-s. (f).

(*m*) Elwes *v.* Mawe, 3 East, 38; and *ante*, 631; Williams *v.* Williams, 12 East, 209.

(*n*) Amos & F. 64—70, 343.

(*o*) 3 Atk. 40; disapproved of by the House of Lords in Fisher *v.* Dixon, 12 Cl. & Fin. 312; Walmsley *v.* Milne, 7 C. B., N. S. 115; 29 L. J., C. P. 97.

(*p*) Lawton *v.* Lawton, 3 Atk. 13; Ld. Dudley *v.* Ld. Warde, Ambler, 113.

(*q*) Lawton *v.* Salmon, 1 H. Blac. 260, note; Amos & F. 36, 343.

(*r*) Wardell *v.* Usher, 3 Scott, N. R. 508; Amos & F. 68, 343.

of management of the nursery-ground (*s*): and it would seem that the tenant cannot remove hothouses, greenhouses, forcing-pits and erections of that description (*t*), [*637] *otherwise than as allowed by the 14 & 15 Vict. c. 25, s. 3 (*u*), or the Agricultural Holdings Act. In no case can private persons sell or remove fruit-trees, although planted by themselves (*x*); nor hedges, nor flowers, nor even a border or edging of box (*y*).

(e) *Contracts respecting Fixtures.*

Construction of express contracts as to removal. — It is a principle of law applicable to fixtures, as well as other things, that individuals, on entering into a contract, may agree to vary the strict position in which they would otherwise legally stand towards each other, where no absurdity or general inconvenience would result from the transaction (*z*). *Modus et conventio vincunt legem* (*a*). Therefore buildings erected for the purposes of trade, under leases containing covenants to yield up in repair, at the expiration of the term, all buildings which should be erected upon the demised premises, cannot be removed by the lessees, when the words of the covenant are general, and contain no exception of any particular sort of buildings (*b*). Where a lease contained a general covenant to repair and leave in repair, and lime-kilns were erected by

(*s*) Wetherell *v.* Howells, 1 Camp. 227.

(*t*) Amos & F. 70, 343; but see Syme *v.* Harvey, 24 Sc. Sess. Cas. 202.

(*u*) *Ante*, 632.

(*x*) Wyndham *v.* Way, 4 Taunt. 316, Heath, J.; Com. Dig. tit. Waste (D. 3); Amos & F. 69, 344.

(*y*) Empson *v.* Soden, 4 B. & Ad. 655; Amos & F. 70.

(*z*) Amos & F. 108, 345; Dumergue *v.* Rumsey, 2 H. & C. 777; 33 L. J., Ex. 88; Stansfield *v.* Mayor, &c., of Portsmouth, 4 C. B., N. S. 120; 27 L. J., C. P. 124; Bishop *v.* Elliott (in error), 11 Exch. 113, 122; 24 L. J., Ex. 229; Earl of Mansfield *v.* Blackburne, 6 Bing. N. C. 426.

(*a*) 2 Co. R. 73; Broom's Max. 661 (4th ed.); Haslett *v.* Burt, 18 C. B. 162, 893. This principle was recognized by sect. 54 of the repealed Agricultural Holdings Act, 1875, which enacted that nothing in that act "shall prevent a landlord and tenant, or intending landlord and tenant, from entering into and carrying into effect any such agreement as they think fit, or shall interfere with the operation thereof."

As to whether this can be done under sect. 34 of the Act of 1883, see p. 635, *ante*.

(*b*) Naylor *v.* Collinge, 1 Taunt. 19; Thresher *v.* East London W. W. Co., 2 B. & C. 608; but see Dean *v.* Allalley, 3 Esp. 11.

the lessee during the term, it was held, that he could not remove them at the end of the term without committing a breach of covenant (*c*). So salt pans erected by a tenant during his term cannot be removed where the lease contains a covenant to leave the salt works in good repair at the end of the term (*d*). Where there was a covenant to keep in repair the premises, and all erections, buildings, and improvements erected on the same during the term, and to yield up the same at the end of the term, it was held to be broken by the removal of a veranda erected during the term, the lower part of which was affixed to the ground by means of posts (*e*). Where there is a covenant to yield up at the expiration of the term all erections and improvements made during the term, a greenhouse, the framework of which is laid on walls embedded in mortar, cannot be removed, although no *damage is done to the walls by removing it (*f*). [*638] A lease contained covenants by the lessee to keep and leave in repair the demised premises, "together with all wainscots, *windows*, shutters, fastenings, &c., and other things which then were, or at any time thereafter should be, thereunto *affixed or belonging* (looking-glasses and furniture excepted), and together also with all sheds and other erections and *improvements* which should be erected, built or made upon the demised premises." An assignee of the lease during the term, removed an old shop window, and put up in its place a plate-glass front, but without in any manner fastening it to the premises, except by means of wedges; held, that this plate-glass front was either a "window" or an "improvement within the true meaning of the covenant, and therefore irremovable by the tenant at the end of the term, *although erected for the purposes of trade*" (*g*).

Renounced fixtures. — Where by the terms of his lease or agreement the tenant renounces his ordinary right to remove

(*c*) Thresher *v.* East London W. W. Co., *supra*.

(*d*) Earl of Mansfield *v.* Blackburne, 6 Bing. N. C. 426.

(*e*) Penry *v.* Brown, 2 Stark, R. 403.

(*f*) West *v.* Blakeway, 2 M. & G. 729; 9 Dowl. 846.

(*g*) Haslett *v.* Burt, 18 C. B. 162, 893; 25 L. J., C. P. 201, 295.

any of his fixtures during the term, the sheriff cannot take them under an execution against him (*h*).

General words. — A lease contained a covenant to yield up certain scheduled articles, together with all doors, wainscots, shelves, presses, dressers, drawers, locks, keys, bolts, bars, staples, hinges, hearths, chimney-pieces, mantel-pieces, chimney-jambs, foot-pans, slabs, covings, window-shutters, partitions, sinks, water-closets, cisterns, pumps and rails, water-tanks, *and other additions*, *improvements*, *fixtures and things* which were and should be anyways fixed or fastened upon the premises: held, that the general words could not be restricted (there being no assignable genus to which the enumerated articles belonged), and that the lessee could not make a marketable title even to articles in the nature of tenant's fixtures (*i*). So the lessee of an oil refinery who has covenanted to deliver up the premises at the end of the term, together with all doors, &c. (specifying numerous articles), and *all other things* which now are or at any time during the said term shall be fixed or fastened to the freehold, has no right to remove trade fixtures, and may be restrained from so doing (*k*). Where a colliery, with machinery and implements for working it, was leased for years, with a proviso for re-entry on non-payment of rent, and a covenant by the lessee, at the determination of the demise to deliver up the machinery and implements, conformably to an inventory annexed to the lease, of which a revaluation was to be made three months before the expiration of the demise; [*639] and the landlord * recovered judgment in ejectment in Trinity term for a forfeiture for non-payment of the rent, but did not execute the writ of possession until the 8th of November, and the tenant committed an act of bankruptcy the next day; it was held, that the landlord was entitled to take possession of all the machinery and implements (some of which had been brought on the premises by the tenant during the term), although no previous valuation had

(*h*) Dumergue *v.* Rumsey, 2 H. & C. 777; 33 L. J., Ex. 88.

(*i*) Wilson *v.* Whateley, 1 J. & H. 436; 7 Jur., N. S. 908.

(*k*) Bidder *v.* Trinidad Petroleum Co., 17 W. R. 153.

been made (*l*). A lease of mines contained a covenant for the lessee to erect furnaces, ironworks, &c., and to repair and yield up the furnaces, fire-engines, iron-works, dwelling-houses and all other erections, &c., to be erected, built or set up, except the iron-work, castings, railways, whimseys, gins, machines, and the movable implements and materials used in or about the said furnaces, fire-engines, iron-works, stone-pits and premises; and there was a power given to the lessor to purchase the excepted articles; it was held, that the lessee had a right to remove whatever was in the nature of a machine, or part of a machine, though fixed in brick-work, but not what was in the nature of a building or support of a building, although made of iron (*m*). A covenant to leave a water-mill with all fixtures, fastenings and *improvements*, was held to include a pair of new mill-stones, set up by the lessee during the term, although by custom they might have been removed (*n*). A covenant by a lessee that at the end of the term he would deliver up to the lessor the demised premises, "together with all locks, keys, bars, bolts, *marble and other chimney-pieces*, foot-pans, slabs, *and other fixtures and articles in the nature of fixtures*, which shall at any time during the said term be fixed or fastened to the said demised premises, or be thereto belonging," is confined to "landlord's fixtures," and does not prevent the lessee from removing or selling *trade and other tenant's fixtures* erected by himself during the term (*o*). In Duck *v.* Braddyll a lease was made of a cotton factory and machinery in consideration of 1,250*l.* paid on execution of the lease, and yielding for the first year 1,600*l.*, on the next day, and 350*l.* yearly afterwards. There were provisoes that the lessor might distrain the machinery for rent, and that when the

(*l*) Storer *v.* Hunter, 3 B. & C. 368; and see Clark *v.* Crownshaw, 3 B. & Ad. 804; Horn *v.* Baker, 9 East, 215; Fairburn *v.* Eastwood, 6 M. & W. 679.

(*m*) Foley *v.* Addenbrooke, 13 M. & W. 174; Amos & F. 90. And see Rex *v.* Topping, M'Clel. & Younge, 544; Dumergue *v.* Rumsey, 3 H. & C. 777.

(*n*) Martyr *v.* Bradley, 9 Bing. 24.

(*o*) Bishop *v.* Elliott (in error), 11 Exch. 113; 24 L. J., Ex. 229. The court below decided that the lessee had the right to sell only the trade fixtures; Elliott *v.* Bishop, 10 Exch. 496, 522; 24 L. J., Ex. 33; but the judges were much divided in opinion.

rents reserved to be payable for the first year should have been paid, and all other covenants, &c., therein contained on the lessee's part had been fulfilled, the lessee should become absolutely entitled to the machinery. There was also a covenant to use the machinery on the premises and [*640] not elsewhere. It was held, that the *property in the machinery passed to the lessee on the payment of the 1,600*l.*, and that it did not continue in the lessor until the end of the term (*p*). In conclusion upon this part of the subject, — before a tenant removes an article which he considers as a removable fixture, he should examine his right not only with reference to the general law of fixtures, but also as it may be affected by any express or implied contract by which he may be bound. Where a tenant renews or extends his term, he must be careful to preserve his right to fixtures, for, without some express stipulation on the subject, he may lose his right at the expiration of his first term (*q*).

Other points.— Accepting the demise of a house containing fixtures, does not raise an implied contract to pay for the fixtures (*r*). By the grant of a house with the appurtenances all the fixtures pass, unless some intention to the contrary be expressed (*s*). But it is otherwise where, by an enumeration of particular fixtures in the conveyance, an intention is shown to exclude other: *expressio unius est exclusio alterius* (*t*). Upon the sale of a mill or factory, looms used in the mill are not within the words "steam-engines, boilers, shafting, piping, mill-gearing, gasometer, gas-pipes, drums, wheels, and all and singular other the machinery, fixtures, and effects fixed up, in, attached or belonging to the mill or factory or premises" (*u*). So looms standing upon a loom-foot, from which they may be removed at pleasure, will not pass by the general term of machinery, though they are

(*p*) Duck *v.* Braddyll, M'Clel. 217, 13 Price, 455.

(*q*) *Post*, Sect. 9; Fitzherbert *v.* Shaw, 1 H. Blac. 258; Thresher *v.* East London Waterworks Co., 2 B. & C. 608, 614; Amos & F. 345, 351.

(*r*) Goff *v.* Harris, 5 M. & G. 573.

(*s*) Colegrave *v.* Dias Santos, 2 B. & C. 76; Steward *v.* Lombe, 1 Brod. & B. 506; Boydell *v.* M'Michael, 1 C. M. & R. 177; Longstaff *v.* Meagoe, 2 A. & E. 167.

(*t*) Hare *v.* Horton, 5 B. & Ad. 715.

(*u*) Hutchinson *v.* Kay, 23 Beav. 413; 26 L. J., Ch. 457.

worked by steam-power which is attached to the mill and mortgaged with it (*u*). A mortgage of a silk-mill was expressed to include "all those the steam-engines, boilers, steam-pipes, main-shafting, mill-gearing, millwrought work and other machinery and fixtures, whatsoever, then erected or set up or standing, &c., in or upon the mill or any part thereof:" — held, that all the machinery and fixtures used in the manufacturing of silk within the mill were included (*x*).

Contracts for sale of fixtures not within Statute of Frauds. Wherever, therefore, it is intended in contracts which concern the realty as well as the fixtures, that the latter should be paid for separately, a stipulation to that effect ought to be introduced. Contracts for the sale of fixtures are not within the Statute of Frauds, as they are not goods and chattels within the meaning of the statute, nor do they, although annexed to the freehold, constitute an interest in *land (*y*). But a memorandum of the [*641] actual sale of fixtures requires a conveyance stamp, and it makes no difference that it is in the past tense (*z*). A reversionary interest in trade fixtures will pass by an agreement in writing, though not under seal (*a*). Where a lessee, who had power to remove a greenhouse fixed to the freehold, agreed to sell the lease, together with the greenhouse and furniture, plants and crops, for a certain sum, but was afterwards unable to obtain the lessor's consent to the assignment of the lease, which was necessary: it was held, that the contract was an entire one, and that the lessee could not sue for the price of the greenhouse (*b*).

Mortgage of fixtures. — It was held by the House of Lords, in Meux *v.* Jacobs (*c*), that the mortgage of a lease was a mortgage by implication of tenant's fixtures, whether affixed by the tenant before or after the mortgage; and it was pointed out

(*x*) Haley *v.* Hammersley, 3 De Gex, F. & J. 587; 30 L. J., Ch. 771; and see Colegrave *v.* Dias Santos, 2 B. & C. 76.

(*y*) Hallen *v.* Runder, 1 C., M. & R. 275; Lee *v.* Risdon, 7 Taunt. 191; Pinner *v.* Arnold, 1 Tyr. & Gr. 4; Lee *v.* Gaskell, L. R., 1 Q. B. D. 700.

(*z*) Horsfall *v.* Hey, 2 Exch. 778.

(*a*) Petrie *v.* Dawson, 2 C. & K. 138.

(*b*) Sleddon *v.* Cruikshank, 16 M. & W. 71.

(*c*) L. R., 7 H. L. 481; 44 L. J., Ch. 481; 32 L. T. 171; 23 W. R. 526.

that it did not require registration under the Bill of Sale Act, 1854, as against the holder of a bill of sale. As against such a person, the fixtures, although removable by the tenant as trade fixtures during the term, were held to continue chattels real, although as against trustees for creditors and execution creditors the Bill of Sale Act made them chattels personal.

Separate mortgage of fixtures. — And even as against trustees for creditors and execution creditors, a mortgage of fixtures did not require registration under the Bill of Sale Act, 1854, unless it gave power to the mortgagee to sell or take possession of the fixtures separately (*d*). If such power were given, the mortgage required registration, although there were no assignment of the fixtures in so many words (*e*).

Bills of Sale Acts. — Under the Bills of Sale Act, 1882 (45 & 46 Vict. c. 43), every bill of sale of "personal chattels" requires registration as therein mentioned, otherwise it is void. But by s. 4 of the Bills of Sale Act, 1878, the term "personal chattels" (which included fixtures generally in the repealed Bill of Sale Act, 1854) means (inter alia) fixtures "*when separately assigned or charged*," "but shall not include fixtures (except 'trade machinery') when assigned together with a freehold or leasehold interest in any land or building to which they are affixed." The 5th section of the Act of 1878 contains an elaborate definition of "trade machinery" for the purpose of the Bills of Sale Acts.

Rights of trustees in bankruptcy. — It has been held that a steam-engine, erected for the purpose of working a colliery, to be used by the lessee of such colliery during his [*642] * term, but to be held as the property of the landlord, subject to such use, did not pass to the assignees of the tenant on his bankruptcy (*f*): that fixtures which were by law removable as between landlord and tenant, part of which were erected before a mortgage, and part afterwards,

(*d*) *Ex parte* Barclay, *Re* Joyce, L. R., 9 Ch. 577; 43 L. J., Bank. 137; 30 L. T. 479; 22 W. R. 608, distinguishing *Ex parte* Daglish, L. R., 8 Ch. 1072.

(*e*) *Ex parte* Daglish, *ubi supra*. See also Longbottom *v.* Berry, L. R., 5 Q. B. 123; Mather *v.* Fraser, 2 K. & J. 536.

(*f*) Coombs *v.* Beaumont, 5 B. & Ad. 72. And see further Chap. VII., Sect. 11, *ante*.

passed to the mortgagee, and not to the assignees of the bankrupt mortgagor (*g*): and that where copper roller manufacturers, being seised in fee of a mill and land, erected thereon steam-engines, machinery, &c., for the purposes of their trade, and then mortgaged in fee the mill and land, with all fixtures, &c., and afterwards became bankrupt, the mortgagees were entitled to all the machinery, &c., fixed to the freehold, and that the deed did not require to be registered as a bill of sale under the Bill of Sale Act, 1854 (*h*). But a mortgage of trade fixtures without the mill or land to which they are annexed, was held to be a mortgage of personal chattels within the meaning of that act, as explained by sect. 7, which includes "fixtures and other articles capable of complete transfer by delivery" (*i*). And such fixtures will be deemed to be in the order and disposition of the mortgagor in the event of his bankruptcy whilst he remains in possession thereof (*k*). The registration of the mortgage under the Bill of Sale Act, 1854, was held to make no difference in this respect (*l*).

What passes by mortgage. — It may be added, that even before the decision of the House of Lords in Meux *v.* Jacobs, above referred to, it had been held that by a mortgage of a mill, the stones, tackling and implements pass to the mortgagee (*m*); that an equitable mortgage of a leasehold public-house with the fixtures therein, consisting of ordinary house fixtures and trade fixtures, was sufficient to prevent any of them being in the order and disposition of the lessee on his becoming bankrupt (*n*); and that under an equitable mortgage, by the simple deposit of a lease unaccompanied by any memorandum, the tenant's fixtures will be included (*o*).

(*g*) *Ex parte* Reynel, 2 Mont., D. & De G. 443; Fletcher *v.* Manning, 1 C. & K. 350; *Ex parte* Cowell, 17 L. J., Bank. 16.

(*h*) Mather *v.* Fraser, 2 Kay & J. 536; 25 L. J., Ch. 361; Boyd *v.* Shorrock, L. R., 5 Eq. 72, 80; 37 L. J., Ch. 154.

(*i*) Waterfall *v.* Penistone, 6 E. & B. 876; 26 L. J., Q. B. 100.

(*k*) Whitmore *v.* Empson, 23 Beav. 313; 26 L. J., Ch. 364.

(*l*) Badger *v.* Shaw, 2 E. & E. 472; 29 L. J., Q. B. 73.

(*m*) Place *v.* Fagg, 4 Man. & R. 277; *Ex parte* Bentley, *Re* West, 2 Mont. D. & De G. 591.

(*n*) *Ex parte* Barclay, 5 De G., M. & G. 403; 25 L. J., Bank. 1.

(*o*) Williams *v.* Evans, 23 Beav. 239.

And it was distinctly laid down in Meux *v.* Jacobs, that the distinction, at one time (*p*) supposed to subsist between mortgages of freeholds and leaseholds, as regards registration, is not maintainable (*q*).

Tenant's fixtures do not pass by mortgage. — The above cases however relate to the mortgagor's fixtures. The [*643] * fixtures of the tenant of a mortgagor, brought by him upon the demised premises after the mortgage, do not pass to the mortgagee, but may be removed by the tenant of the mortgagor (*r*).

(f) *Removal of Fixtures.*

When tenant may remove fixtures. — The right of a tenant to remove tenant's fixtures is a power coupled with an interest (*s*), which may be assigned by deed (*t*), and continues only during his original term (*u*), and "during such further period of possession by him as he holds the premises under a right still to consider himself as tenant" (*x*). The meaning of this modification of the rule that tenant's fixtures vest in the landlord immediately on the determination of the term (*y*) is not very plain (*z*); but it seems clear that if the tenant quit the premises, and the landlord re-enter, the tenant's right to remove the fixtures is gone. Where steam-engines were removable by the lessee, and had not been removed previously to the lessor entering for a forfeiture, it was held, that trover could not be maintained for them (*a*).

(*p*) See Hawtrey *v.* Butlin, L. R., 8 Q. B. 290, *per* Lush, J.

(*q*) And see *Ex parte* Tweedy, *Re* Trethowan, 46 L. J., Bank. 43.

(*r*) Sanders *v.* Davis, L. R., 15 Q. B. D. 218.

(*s*) Pool's case, 1 Salk. 368; Minshall *v.* Lloyd, 2 M. & W. 460.

(*t*) Hallen *v.* Runder, 1 C., M. & R. 266; London and Westminster Loan and Discount Co. *v.* Drake, 6 C. B., N. S. 798, 811; 28 L. J., C. P. 297.

(*u*) *Ex parte* Quincey, 1 Atk. 477; Lee *v.* Risdon, 7 Taunt. 191; Colegrave *v.* Dias Santos, 2 B. & C. 76; Minshall *v.* Lloyd, 2 M. & W. 450, 460.

(*x*) Weeton *v.* Woodcock, 7 M. & W. 14.

(*y*) See Lyde *v.* Russell, 1 B. & Ad. 394, in which case the tenant *had quitted possession*, and failed to recover severed fixtures from the landlord in trover.

(*z*) Leader *v.* Homewood, 5 C. B., N. S. 546; 27 L. J., C. P. 316; and see the question discussed by Kindersley, V.-C., in Gibson *v.* Hammersmith R. Co. (32 L. J., Ch. 337), in which the defendants were held bound, under the Lands Clauses Act, to give compensation for trade fixtures.

(*a*) Minshall *v.* Lloyd, 2 M. & W.

The right of the tenant is gone, too, where the landlord re-enters for a forfeiture by reason of the tenant having become a bankrupt (*b*), or where the landlord recovers possession under an ejectment for a forfeiture (*c*). In Penton *v.* Robart (*d*), however, a sub-tenant, who remained in possession after recovery in ejectment both against the mesne landlord and himself, was held entitled to remove fixtures, the superior landlord recovering nominal damages only for breaking and entering, and the verdict being entered for the sub-tenant in respect of the trespass de bonis asportatis. This case is, no doubt, a strong one in favour of the tenant (*e*); but it is strenuously argued by Mr. Amos (*f*) that the decision itself "forms no exception to the general rule in favour of the landlord."

On the whole it seems that, unless the landlord does some act to *create what has been called an [*644] "excrescence of the term," the right to unsevered fixtures vests in the landlord on the determination of a term certain.

If the term be an uncertain one, as if the lessor be a tenant for life, or if the tenancy be at will, it seems clear, although it has not been expressly decided (*g*), that the tenant will be allowed a reasonable time, after the expiration of his estate, to remove "tenant's fixtures." For no laches can be imputed to such a tenant in not having availed himself of the privilege of severance during the term; neither can a gift to the landlord be implied (*h*).

In Porter *v.* Drew (*i*) a sub-lease of a nursery ground contained a covenant by the sub-lessee to deliver up all *landlord's* fixtures at the end of the term. The head lease contained a covenant (unknown to the sub-lessee) that the lessee would deliver up not only all landlord's fixtures, but

450; Mackintosh *v.* Trotter, 3 M. & W. 184.

(*b*) Pugh *v.* Arton, L. R., 8 Eq. 626; 38 L. J., Ch. 619.

(*c*) Minshall *v.* Lloyd, 2 M. & W. 450; Mackintosh *v.* Trotter, 3 M. & W. 184; but see Sumner *v.* Bromilow, *infra* (*k*).

(*d*) 2 East, 88.

(*e*) See Heap *v.* Barton, 12 C. B. 278; *per* Jervis, C. J.

(*f*) Amos & F. 102.

(*g*) See, however, Martin *v.* Rowe, 7 E. & B. 237.

(*h*) Amos & F. 107.

(*i*) L. R., 5 C. P. D. 143.

also all *trade* fixtures at the end of the term of the head lease. It was said that a covenant in the sub-lease that the sub-lessee would be allowed by the mesne landlord, apart from the head lease to remove trade fixtures might not unreasonably be implied, but the Court was clearly of opinion that there was no implied covenant in the sub-lease that the head lease did not contain the covenant to deliver up the trade fixtures.

Special agreement. — A reasonable time for removal after the expiration of the term will also be allowed in the case of a stipulation in the lease that the tenant may remove the fixtures "at the expiration of the term" (*k*).

Surrender. — The surrender of a lease, it may be added, will not prejudice the rights of a purchaser of fixtures before the surrender (*l*). Where the purchaser of lands brought an ejectment against a tenant from year to year, and the parties entered into an agreement that judgment should be signed for the plaintiff, with a stay of execution till a given period; it was held, that the tenant could not in the interval remove buildings, &c., from the premises which he had himself erected during his term, and before the action was brought (*m*). Where the landlord during the term, by letter, declined to buy the tenant's fixtures, but added, "I have no objection to your leaving them on the premises and making the best terms you can with the incoming tenant," it was held that such letter did not operate as a valid licence (it not being under seal); and that if the new tenant [*645] refused to pay * for the fixtures so left, or to permit them to be removed, no action of *trover* would lie for them, whilst they remained unsevered from the freehold (*n*). Where the tenant has a legal right to remove fixtures after the end of his term, and is prevented from doing so by the landlord or incoming tenant, the action should be for pre-

(*k*) Stansfield *v.* Mayor of Portsmouth, 4 C. B., N. S. 120; 27 L. J., C. P. 124; and see Sumner *v.* Bromilow, 34 L. J., Q. B. 130; 11 Jur., N. S. 481; Pugh *v.* Arton, *supra*.

(*l*) Saint *v.* Pilley, L. R., 10 Ex. 137; London and Westminster Discount Co. *v.* Drake, 6 C. B., N. S. 798; 28 L. J., C. P. 297.

(*m*) Fitzherbert *v.* Shaw, 1 H. Blac. 258; Heap *v.* Barton, 12 C. B. 274.

(*n*) Roffey *v.* Henderson, 17 Q. B. 574; Leader *v.* Homewood, 5 C. B., N. S. 546.

venting the plaintiff from exercising his right to sever and remove the fixtures (*o*). But the value of fixtures severed during the tenancy, and of other goods left behind, may (after a sufficient demand and refusal) be recovered in trover (*p*). But it is otherwise with respect to fixtures which were left unsevered on the expiration of the tenancy (*q*).

How the removal must be effected. — It appears to be generally understood in practice that where trading as well as ornamental fixtures may be removed, and are accordingly taken down, the tenant is liable to repair any injury the premises may sustain by the act of removal; and in like manner, it would seem, that where a fixture has been put up in substitution for an article which was attached to the premises at the time of the demise, the tenant, on taking down his own fixture, is bound to restore the former article, or to replace it by another erection of a similar description (*r*). It has been held, that in removing engines, &c., partly fixed in brickwork, which a tenant has by the terms of his lease a right to remove, he may disturb such brickwork as is necessary, and is not bound to restore it to a perfect state, but that he is liable for unnecessary disturbance of brickwork (*s*).

(g) *Remedies respecting Fixtures.*

Landlord's remedies for the wrongful removal. — When fixtures which have become part of the realty, and irremovable according to law, have been removed, the landlord may maintain an action on the case in the nature of waste; for such removal amounts to an injury to the reversion, which the law considers waste (*t*). Where such waste amounts to a breach of covenant, the landlord may sue either in case, or on the covenant, at his election (*u*). He may also, before the removal,

(*o*) London and Westminster Loan and Discount Co. *v.* Drake, 6 C. B., N. S. 800, 811.

(*p*) Leader *v.* Homewood, 5 C. B., N. S. 546, 548.

(*q*) Wilde *v.* Waters, 16 C. B. 637.

(*r*) Amos & F. 89.

(*s*) Foley *v.* Addenbrooke, 13 M. & W. 174.

(*t*) Hitchman *v.* Walton, 4 M. & W. 409; Smith *v.* Render, 27 L. J., Ex. 83.

(*u*) Kinlyside *v.* Thornton, 2 W. Blac. 1111; Kerne *v.* Benbow, 4 Taunt. 764; Marlyr *v.* Bradley, 9 Bing. 24.

apply to the High Court for an injunction to prevent the removal (*x*). Although a landlord cannot maintain an action of trespass for entering the premises during the occupation of the tenant, because occupation is necessary to maintain that form of action; yet immediately upon the severance [*646] of the *fixtures from the realty, they become mere chattels, and he may maintain an action of trespass for taking them away, for the property is vested in him from the time of severance (*y*); again, where the fixtures have been unlawfully severed from the freehold and carried away, or otherwise converted or disposed of, the landlord may maintain an action of trover for their value (*z*).

Remedies to recover the value of fixtures. — Fixtures being often the subject of contracts, actions may be brought for any breach of such contracts by either of the parties (*a*). These actions generally arise either from the breach of contracts respecting the care and disposition of fixtures during the existence of a tenancy, or upon contracts for the sale of fixtures. A lessee cannot even during his term maintain trover for fixtures attached to the freehold (*b*). If a landlord, during the term, severs fixtures from the freehold and distrains them, the tenant may maintain trover for them (*c*). But where a tenant leaves fixtures at the end of his term and the landlord afterwards severs them, the tenant cannot maintain trover for them (*d*). Where a tenant assigned his lease by way of mortgage, but continued in possession and became bankrupt, whereupon the assignees removed fixtures which by the lease were to be yielded up at the end of the term to the lessor; it was held, that the mortgagee might maintain trover against the assignees (*e*). If a lessee, who is possessed of tenant's fixtures, mortgage his term with the fixtures and afterwards

(*x*) Amos & F. 281—287.

(*y*) Farrant *v.* Thompson, 5 B. & A. 826; Amos & F. 352.

(*z*) Hitchman *v.* Walton, 4 M. & W. 409.

(*a*) Martyr *v.* Bradley, 9 Bing. 24; Watson *v.* Lane, 11 Exch. 769; 25 L. J., Ex. 101.

(*b*) Mackintosh *v.* Trotter, 3 M. & W. 184; Roffey *v.* Henderson, 17 Q. B. 574.

(*c*) Dalton *v.* Whittem, 3 Q. B. 961; Clarke *v.* Holford, 2 C. & K. 540.

(*d*) Lyde *v.* Russell, 1 B. & Ad. 394.

(*e*) Hitchman *v.* Walton, 4 M. & W. 409.

becomes bankrupt the mortgagee may recover in trover the value of the fixtures from the assignees, who have removed and converted them (*f*). Where the assignees of a bankrupt mortgagor who had vested in his mortgagee an immediate interest in fixtures severed and sold them; it was held, that the mortgagee was entitled to recover from the assignees the value of the fixtures estimated as between outgoing and incoming tenant (*g*). A lessee of a house containing fixtures, executed an assignment of the premises by way of mortgage, not mentioning the fixtures: he afterwards assigned the premises and all his estates and effects, to trustees; the trustees being in treaty for a sale of the fixtures, the mortgagee, whose principal and interest were due, took forcible possession of the house, and refused, on demand, to deliver up the fixtures; the trustees brought trover; and it was held, that they could not recover for them (*h*).

* **Remedies for improper sale of fixtures.** — If an in- [*647] coming tenant purchase as fixtures from the outgoing tenant property which in fact belongs to the landlord, he may recover back the money he paid for it, in an action against the outgoing tenant for money had and received; and in such action it will be no defence that the outgoing tenant was not aware that the articles belonged to the landlord, having bought them himself from a preceding tenant; he, however, has his remedy against such preceding tenant (*i*). But there is no *implied* warranty of title in the contract of sale of a *personal chattel*, the maxim being *caveat emptor:* and therefore, in the absence of fraud, a vendor is not liable for a defect of title, unless there be an express warranty, or an equivalent to it, by declaration or conduct (*k*). Where the owner of the goodwill and fixtures of a public-house allowed another person to represent himself as such to the landlord, whereupon they let the house to him and he sold

(*f*) Boydell *v.* M'Michael, 1 C., M. & R. 177; Thompson *v.* Pettit, 10 Q. B. 101; Horsfall *v.* Hey, 2 Exch. 778.

(*g*) Thompson *v.* Pettit, *supra.*

(*h*) Longstaff *v.* Meagoe, 2 A. & E. 167.

(*i*) Robinson *v.* Anderton, Peake, 94.

(*k*) Morley *v.* Attenborough, 3 Exch. 500; Ormrod *v.* Huth, 14 M. & W. 651, 664; Burnby *v.* Bollett, 16 M. & W. 644; Sims *v.* Marryat, 17 Q. B. 281.

the house and fixtures to a bonâ fide purchaser; it was held, that the real owner of the fixtures had estopped himself from recovering the fixtures of the purchaser (*l*).

SECT. 9. — *Survey and Valuation of Dilapidations and Fixtures.*

Right of landlord to enter the premises to survey, &c. — A landlord has no legal right during the term to enter upon the demised premises to view their condition, or the dilapidations, wants of repair, mode of cultivation, &c., except in pursuance of some power or authority in that behalf contained in the lease or agreement, or the written or oral leave of the tenant (*m*). For any such unauthorized entry he would be liable to an action of trespass at the suit of the tenant. When, as frequently is the case, there is a covenant or proviso in the lease or agreement that the landlord may enter so many times during the year to survey the premises, and to require the necessary repairs to be done, he may select any days in the year as he thinks fit, whether they be the worst or the best time for doing repairs (*n*). But a covenant for a landlord to be allowed to come into a house to see the state of its repair "at convenient times" is not broken by his not being allowed to go into some of the rooms, if the tenant has had no previous notice of his coming (*o*).

[*648] ***Estimate of dilapidations.** — Towards the end of the term, some respectable and competent surveyor or architect (to be mutually agreed on) should be employed on behalf of both landlord and tenant to ascertain what defects and wants of repairs exist *contrary to the covenants or stipulations in the lease or agreement*, and the sum it will take to do what is necessary. He should, of course, be furnished with the lease or agreement, or a copy; and he should be acquainted with the law as to the construction of covenants

(*l*) Gregg *v.* Wells, 10 A. & E. 90; and see Freeman *v.* Cooke, 2 Exch. 654; 6 D. & L. 187; Clarke *v.* Hart, 6 H. L. Cas. 633, 644, 655.

(*m*) *Ante*, 599.

(*n*) Hill *v.* Barclay, 16 Ves. 403.

(*o*) Doe *d.* Wetherell *v.* Bird, 6 C. & P. 195.

to repair and leave in repair, &c. (*p*). He should decide fairly and impartially between the parties, in like manner as an arbitrator. He should make a schedule of the repairs, &c., necessary to be done (stating them in detail), with an estimate of the sum it will take to do such repairs, &c. Such schedule and estimate should be written upon an appraisement stamp (*q*). When the appraisement is not made on behalf of both parties, but merely for the private information of the party procuring it to be made, it does not require any stamp (*r*). The charges of and incident to such survey and appraisement should be expressly provided for by agreement between the parties and the person employed. In some cases the decision of the valuer may be reviewed by the court, in the same manner as ordinary arbitrations (*s*).

Amount of damages. — It is usual and desirable that the tenant should, instead of executing the required repairs himself, pay the estimated cost of them to the landlord. What this cost is to be must depend almost entirely on the judgment of the surveyor. For the modern practice of surveyors, the reader is referred to the useful "Handbook of House Property," by Mr. E. L. Tarbuck, architect and surveyor, of which a second edition was published in 1880.

Valuation of fixtures. — The valuation of any fixtures to be paid for by the landlord at the end of the term may be made in like manner. But, as a general rule, a landlord is not obliged to pay for any fixtures whatever, except such as he has expressly contracted to take and pay for at the end of the term, or for which he is liable according to the custom of the country. Where a valuation of fixtures takes place, as above suggested, nothing should be included in it except those fixtures which the tenant has a legal right to be paid

(*p*) *Ante*, 587 *et seq.*

(*q*) Stamp Act, 1870 (33 & 34 Vict. c. 97), and Sched. tit. Appraisement, *post*, Appendix A., Sect. 7.

See a very full form of specification illustrating "a few matters arising" under the ordinary covenant to leave in repair, in Tarbuck's Handbook of House Property, 2nd ed. p. 74.

(*r*) Atkinson *v.* Fell, 5 M. & S. 240; Jackson *v.* Stopherd, 2 Cr. & M. 361, 367; Amos & F. 357; Stamp Act, 1870 (33 & 34 Vict. c. 97), and Sched. tit. Appraisement, Exemption 1.

(*s*) See *Re* Hopper, L. R., 2 Q. B. 367; 36 L. J., Q. B. 97.

for pursuant to the covenant or custom, or to remove during the term (*t*), either by virtue of some express [*649] * stipulation in his lease or agreement (*u*), or by the custom of the country (*x*), or under the general law of fixtures. Under the last are comprised articles of ornament and convenience (*y*), machinery, engines and other things erected for the purpose of trade (*z*), and not merely for agricultural purposes (*a*); unless, indeed, they were erected or put up with the written consent of the landlord, and one calendar month's written notice of the tenant's intention to remove them has been given, and the landlord has elected to purchase them pursuant to 14 & 15 Vict. c. 25, s. 3 (*b*), or the contract of tenancy be subject to the operation of one or other of the Agricultural Holdings Acts (*c*).

If, after such valuations have been made and paid for, the incoming tenant discover that he has paid for too much, or for things not included in the valuation, he cannot recover the over-payments in an action for money had and received, especially where he had not given any notice of the errors, and demanded back the money before action (*d*).

Valuations between outgoing and incoming tenants. — Valuations between outgoing and incoming tenants of fixtures, &c., should be made in like manner as between landlord and tenant; but the incoming tenant should take especial care to ascertain that he will have a good title *as against the landlord*, to any fixtures he purchases from the outgoing tenant (*e*): for it is to be remembered that an outgoing tenant, unless the holding be agricultural, has *only a right to remove his own fixtures during his term* (*f*); and even if the holding be agricultural, before or within a reasonable time after the termination of the tenancy, and he cannot, by agreement or otherwise, convey to the incoming tenant (without the landlord's concurrence) a greater right or title than he himself

(*t*) See *ante*, 643.
(*u*) *Ante*, 637.
(*x*) *Post*, Chap. XX.
(*y*) *Ante*, 629.
(*z*) *Ante*, 626.
(*a*) *Ante*, 631.
(*b*) *Ante*, 632.
(*c*) *Ante*, 633, 634.
(*d*) Freeman *v.* Jeffries, L. R., 4 Ex. 189.
(*e*) Elliott *v.* Bishop, 10 Exch. 496; 11 Exch. 113; 24 L. J., Ex. 33; Burt *v.* Haslett, 18 C. B. 162, 893.
(*f*) *Ante*, 643.

possesses. Consequently, if the tenant's fixtures are permitted to remain affixed to the demised premises when the old tenancy ends and the new one commences, they will belong to the landlord as parcel of the freehold, notwithstanding that the incoming tenant has paid for them to the outgoing tenant their full value as fixtures. To prevent this, the fixtures so purchased should be specified in a schedule to the new lease, and an express provision inserted therein that the tenant shall be at liberty at any time during the term to remove and dispose of them (inter alia) as tenant's fixtures. An outgoing tenant, who has quitted possession, has no right to re-enter on the incoming tenant to remove any fixtures whatever (*h*).

* **Surveyor's remuneration.** — The surveyor is to be [*650] paid according to his labour, and not according to the amount of bills he looks over, or the amount of money expended, or to be expended (*i*); although a commission of five per cent. on the sum laid out, when such was proved to be the usage, has been allowed (*k*). If a surveyor make an estimate, which turns out to be incorrect to a considerable amount, and consequently entirely useless, through his omitting to take reasonable precaution in forming his judgment, he is not entitled to recover anything for his plans, specifications, or estimates made for the work (*l*); but this is a dangerous ground of defence, it being a question for the jury whether the work done was of *any* use or value to the defendant (*m*). It is frequently better to pay the sum demanded (as agreed) and afterwards bring a cross-action for the negligence and want of due care and skill. Where in making the valuation the surveyor acts as an appraiser within the meaning of 46 Geo. 3, c. 43, and 8 and 9 Vict. c. 76, by which latter an annual duty of two pounds is imposed, he cannot recover his charges unless duly licensed as an appraiser or as an auctioneer (*n*) or house agent (*o*).

(*h*) Leader *v.* Homewood, 5 C. B., N. S. 546; 27 L. J., C. P. 316.

(*i*) Upsdell *v.* Stewart, Peake, 193.

(*k*) Chapman *v.* De Tastet, 2 Stark. 291; Maltby *v.* Christie, 1 Esp. 340.

(*l*) Moneypenny *v.* Hartland, 1 C. & P. 352; 2 Id. 378; Whitty *v.* Ld. Dillon, 2 F. & F. 67.

(*m*) Farnsworth *v.* Garrard, 1 Camp. 38; Bracey *v.* Carter, 12 A. & E. 373.

(*n*) Palk *v.* Force, 12 Q. B. 666.

(*o*) 24 & 25 Vict. c. 21.

Customary fee. — "The customary fee for estimating dilapidations is five per cent. upon the estimate, but not less than two guineas, exclusive of travelling expenses, time in going to distant parts, and ultimate trouble. An umpire sometimes charges five guineas a day" (*p*).

(*p*) Tarbuck's Handbook of House Property, 2nd ed. p. 85 (A.D. 1880).

ORDINARY PARTICULAR COVENANTS.

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SECT. 1. — *Insurance against Fire.*

(a) *Liability in Case of Fire.*[1]

On whom falls any loss by fire. — At common law tenants were not answerable to their landlords for accidental or negligent burning: then came the Statute of Gloucester (6 Edw. 1, c. 5), which, by making tenants for life and years liable to waste, without any exception, rendered them answerable for destruction by fire (*a*); but by the Building Act, 14 Geo. 3, c. 78, s. 86 (*b*), "no action, suit or process whatsoever shall be had, maintained or prosecuted against any person in whose house, chamber, stable, barn or other building, or on whose estate any fire shall *accidentally begin*, nor shall any recompense be made by such person for any damage suffered thereby;" provided "that no contract or agreement made

(*a*) *Ante*, 609.

(*b*) Which is still in force, 18 & 19 Vict. c. 122, s. 109.

[1] As to liability in America for fires arising from accident or negligence see *ante*, ch. 16, sec. 5, notes upon examples of voluntary and permissive waste. It seems that a tenant for life or for years is usually held to be an insurer, but that a tenant at will or from year to year is not liable except for his own negligence.

between landlord and tenant shall be hereby defeated or made void." This enactment is not, like the greater part of the statute in which it is contained, of a local and personal nature, or confined to the metropolis, but extends to the whole kingdom (*c*). It does not apply where the fire is lighted intentionally, and mischief results to a neighbour; nor where the fire is produced by negligence (*d*), nor will it affect any express covenant or agreement to repair, &c., because of the provision above mentioned.

[*652] * (b) *Covenant to Insure.*

Usual form of covenant to insure, &c. — Leases of premises, which comprise houses or other buildings, frequently contain a covenant on the part of the lessee, his executors, administrators and assigns, to insure all or some of the demised buildings to the full value, or some proportion thereof, or to not less than a fixed amount, in some respectable insurance office (the name of which is sometimes mentioned), either in the joint names of the lessor and lessee (*e*), or in the name of the lessor (*f*) or of the lessee; and to keep the same so insured during the term; and to produce the policy and show the receipt for the premium for the current year to the lessor or his agent on request (*g*); and to lay out and expend all insurance monies received in rebuilding or repairing the demised premises as may be necessary. Usually it is further stipulated that if the insurance monies received prove insufficient, the tenant is to make up the deficiency out of his own money — a stipulation rather severe upon the tenant, especially in the cases where the landlord nominates the insurance office — and sometimes that if the tenant omit to insure, the landlord may do it, and recover the amount paid, by distress or otherwise, as for rent in arrear, a stipulation

(*c*) *Ex parte* Goreley, *In re* Barker, 34 L. J., Bkt. 1; 10 Jur. N. S. 1085. See also Filliter *v.* Phippard, 11 Q. B. 355.

(*d*) Filliter *v.* Phippard, 11 Q. B. 355; Vaughan *v.* Taff Vale R. Co. (in error), 5 H. & N. 679.

(*e*) 8 & 9 Vict. c. 124, Sched. Form 6 (Appendix A., Sect. 1, *post*).

(*f*) Penniall *v.* Harborne, 11 Q. B. 368.

(*g*) 8 & 9 Vict. s. 124, Sched. Form 6, *post*, Appendix A., Sect. 1.

which, looking to the very great loss against which insurance is intended to provide, and the very slight amount of the premium for insurance, appears quite reasonable.

A policy of fire insurance is a contract of indemnity, and upon payment of the amount of loss, the insurer is entitled to be put into the place of the assured. If, therefore, a landlord insure against a loss (such as by explosion covered by a covenant of the tenant to repair containing an exception for fire only), and the demised premises being damaged by gas, the tenant reinstates them in pursuance of the covenant, the insurers can recover the insurance money back from the landlord (*h*).[1]

Laying out of insurance money in rebuilding. — By 14 Geo. 3, c. 78, s. 83, insurance offices are "authorized and required *upon the request of any person or persons interested in or entitled unto* any house or houses or other building which may be burnt down, demolished or damaged by fire, or (without such request) upon any grounds of suspicion that the owner or owners, occupier or occupiers, or any person or persons who shall have insured such house or houses or other buildings, shall have been guilty of fraud, or of wilfully setting their house or houses or other buildings on fire, to cause the insurance money to be laid out and expended, as far as the same will go, towards rebuilding, reinstating or repairing such house * or houses or other buildings so [*653] burnt down, demolished or damaged by fire; unless

(*h*) Darrell *v.* Tibbits, L. R., 5 C. P. D. 560.

[1] **Insurance by landlord.** — The insurance policy of a landlord is personal to himself. He may receive the insurance money, and still require the lessee to pay rent (Magaw *v.* Lambert, 3 Pa. St. 444; Bussman *v.* Ganster, 72 Pa. St. 285); or if he have received the insurance money, and lessee afterward purchase, under a purchase option, the latter is not entitled to receive the insurance money (Gilbert *v.* Port, 28 Ohio St. 276).

It was held in Ely *v.* Ely, 80 Ill. 532, and Lovett *v.* United States, 9 Ct. of Claims 479, 495, that a landlord who has insured may enforce a tenant's covenant to rebuild, and still retain the insurance money. These cases seem contrary to the doctrine stated in the text; and whether they will be followed, *quere*.

It was held, in Hayes *v.* Ferguson, 15 Lea (Tenn.) 1, that where lessor takes out a policy of insurance payable to lessee, and lease provides that lessee shall rebuild in case of fire, if the lessee collect the insurance money, and decline to rebuild, the lessor can recover it of him.

the party or parties claiming such insurance money shall within sixty days next after his, her or their claim is adjusted, give a sufficient security to the governors or directors of such insurance office, that the same insurance money shall be laid out and expended as aforesaid; or unless the said insurance money shall be, in that time, settled and disposed of, to and amongst all the contending parties, to the satisfaction and approbation of such governors or directors of such insurance office respectively."

This enactment is still in force (*i*).[1] It is not limited to the metropolitan district, but is applicable to the whole kingdom (*k*). To entitle a landlord or other owner to the benefit of it, he must make a distinct request to the insurance office to apply the policy money in rebuilding, before they have settled with the tenant insuring; and in no case is the landlord or owner entitled to rebuild himself and claim the policy money (*l*). His remedy appears to be by a mandamus, after a sufficient request and refusal (*l*). A tenant seems to be clearly included in the words "person interested" (*m*). A tenant from year to year insuring is not limited in his claim on the insurance company to the extent of his interest in the property insured (*l*). Trade fixtures put up by a tenant and removable by him are not within the words "houses or other buildings," as used in this section (*n*). A purchaser of property insured for does not, by the mere fact of purchase, acquire a right to the insurance monies (*o*). And where a fire policy has been assigned, the insurers, in the absence of express contract to do so, are not bound upon the application of the assignee to pay him upon the policy (*p*).

(*i*) 18 & 19 Vict. c. 122, s. 109.

(*k*) *Ex parte* Goreley, *In re* Barker, 34 L. J., Bkt. 1; 10 Jur., N. S. 1085.

(*l*) Simpson *v.* Scottish Union Insurance Co., 1 H. & M. 618; 32 L. J., Ch. 329.

(*m*) See *ante*, 409, where the effect of the enactment upon the rule of Leeds *v.* Cheetham, 1 Sim. 146, is noticed.

(*n*) *Ex parte* Goreley, *In re* Barker, *supra*.

(*o*) Poole *v.* Adams, 33 L. J., Ch. 639; 12 W. R. 683.

(*p*) London Investment Co. *v.* Montefiore, 9 L. T. 688.

[1] A lessor is entitled to receive the insurance where the lease binds lessee to insure and assign the policy to lessor, even though the assignment is not, in fact, made. Eberts *v.* Fisher, 54 Mich. 294.

Lessor to have benefit of an informal insurance. — By 22 & 23 Vict. c. 35, s. 7, "the person entitled to the benefit of a covenant on the part of a lessee or mortgagor to insure against loss or damage by fire shall, on loss or damage by fire happening, have the same advantage from any then subsisting insurance relating to the building covenanted to be insured, effected by the lessee or mortgagor in respect of his interest under the lease or in the property, or by any person claiming under him, but not effected in conformity with the covenant, as he would have from an insurance effected in conformity with the covenant."

By s. 8, "where, on the bonâ fide purchase after the passing of this act of a leasehold interest under a lease containing a covenant on * the part of the lessee to in- [*654] sure against loss or damage by fire, the purchaser is furnished with the written receipt of the person entitled to receive the rent, or his agent, for the last payment of rent accrued due before the completion of the purchase, and there is subsisting at the time of the completion of the purchase an insurance in conformity with the covenant, the purchaser or any person claiming under him shall not be subject to any liability, by way of forfeiture or damages or otherwise, in respect of any breach of the covenant committed at any time before the completion of the purchase, *of which the purchaser had not notice before the completion of the purchase;* but this provision is not to take away any remedy which the lessor or his legal representatives may have against the lessee or his legal representative for breach of covenant."

Covenant to insure runs with land. — The covenant to insure seems to be a covenant that runs with the land (*q*). Under a covenant to insure in such office as the lessor or his assigns should direct, an assignee of the reversion cannot take advantage of a direction given by the lessor before assignment, which had not been obeyed, so as to work a forfeiture after the assignment, the lessee not having had notice of the assignment nor any direction from the assignee (*r*).

(*q*) See Vernon *v.* Smith, 5 B. & A. at p. 9, *per* Best, J. And see *ante*, 162.

(*r*) Crane *v.* Batten, 2 Com. L. R. 1696; 23 L. J., Q. B. 220.

Breach of covenant to insure. — Where a lessee has covenanted to insure and keep insured the buildings demised, or any part thereof, it will be a breach of the covenant if he permit them to remain uninsured, although it be only for a short period of time, and no fire or damage happen. Thus, where a lessee covenanted to keep premises insured, and omitted to pay the premium till after the expiration of fifteen days beyond the year, but at the end of the month he paid the premium, which was accepted by the company, as reviving the insurance from the former year; it was held, that the covenant was broken, the premises having in fact remained uninsured from the expiration of the fifteen days to the time the premium was paid (*s*). But where a lessee, having covenanted to keep 800*l.* insured on the premises, effected an insurance containing a memorandum, that in case of the death of the insured the policy might be continued to his personal representative, provided an indorsement to that effect was made upon it within three months after his death, and died, and an indorsement continuing the policy to his personal representative was made after the expiration of the three months, it was held [*655] to be no breach of the covenant to insure (*t*). * Where a lessee covenants to insure and keep insured the buildings demised, and to deposit the policy with the lessor, the covenant does not mean that he is to effect one policy and keep that policy on foot, but that the premises shall always be kept insured by one policy or another; and it is a breach if they are uninsured at any one time, and a continuing breach for any portion of the time they are uninsured (*u*).

Objection to title for non-insurance. — A purchaser of a leasehold may object to the vendor's title on the ground that he has incurred a forfeiture by omitting for the space of a month to pay the annual premium of insurance pursuant to his covenant, although it does not appear that the lessor has

(*s*) Doe *d.* Pitt *v.* Shewin, 3 Camp. 134; Wilson *v.* Wilson, 14 C. B. 616; 23 L. J., C. P. 137; Doe *d.* Darlington *v.* Ulph, 13 Q. B. 204; 18 Id. 106.

(*t*) Doe *d.* Pitt *v.* Laming, 4 Camp. 73.

(*u*) Doe *d.* Flower *v.* Peck, 1 B. & A. 428; Hyde *v.* Watts, 12 M. & W. 254; 1 D. & L. 479; Doe *d.* Baker *v.* Jones, 5 Exch. 498; Cole Ejec. 429.

taken advantage of the forfeiture (*x*). But a defect of this sort may sometimes be provided against by a special condition of sale (*y*).

Continuing breach. — The breach of a covenant to insure is a continuing breach. Where there was a covenant to insure and continue insured the premises in the joint names of the lessor and the lessee, but the lessee effected an insurance in his own name alone, and showed the policy to the lessor, who approved of it, and afterwards accepted rent; it was held, that there was a continuing breach of the covenant, and that the acceptance of rent waived the previous breaches only (*z*). A breach of covenant is committed if the lessee covenants to insure the buildings from time to time and at all times, and leaves a part uninsured for two months after the execution of the lease, or even less (*a*); although the greater part of the premises were already insured at the requisite amount by a policy expiring at the end of two months, and on its expiration a new policy was effected covering all the premises, which were then insured at the stipulated amount (*b*). So, where there was a covenant by the tenant to insure in the names of three lessors and the insurance was made in their names jointly with the tenant, it was held a breach of the covenant (*b*). Where the lessee was to insure, with a proviso that if he did not the lessor might, it was held, that the lessor could not recover in ejectment for a forfeiture, if by his conduct he had led the lessee to believe the premises were insured by himself (*c*).

Action against sublessee. — Where the performance of a covenant to insure in a sublease did not necessarily include a performance of the corresponding covenant in the original lease, and the premises were uninsured, and the *original lessor entered for breach of the covenant [*656] to insure, and there was no general covenant in the

(*x*) Wilson *v.* Wilson, 14 C. B. 616; Palmer *v.* Gosen, 25 L. J., Ch. 841.

(*y*) Howell *v.* Kightley, 8 De Gex, M. & G. 325; 25 L. J., Ch. 864.

(*z*) Doe *d.* Muston *v.* Gladwin, 6 Q. B. 953, Cole Ejec. 429.

(*a*) Penniall *v.* Harborne, 11 Q. B. 368; Doe *d.* Darlington *v.* Ulph, 13 Q. B. 204; 18 L. J., Q. B. 106.

(*b*) Penniall *v.* Harborne, *supra.*

(*c*) Doe *d.* Pitman *v.* Sutton, 9 C. & P. 706; Cole Ejec. 430.

sublease to indemnify against the covenants in the original lease, the lessee failed to recover against the sublessee damages for the term which he had lost by the non-insurance (*d*).

Relief against forfeiture for non-insurance. — As to relief against forfeiture for non-insurance, see ante, Ch. VIII. Sect. 6, p. 328.

SECT. 2. — *Not to Assign or Sublet without Licence.*

(a) *Covenants and Conditions against.*

Such covenants not common and usual. — It seems to be settled, although there are some early decisions to the contrary (*e*), that under an agreement for a lease "with common and usual covenants" the lessor is not entitled to have a covenant inserted not to assign or sublet without his licence (*f*). Even an agreement for a lease to contain a covenant not to sublet and to hold on other covenants of a ground lease which contained a proviso for re-entry on breach of covenants generally, but did not contain a covenant not to sublet, has been held not to entitle the lessor to a proviso for re-entry on breach of the covenant not to sublet (*g*).

Whether licence must be in writing. — A covenant or proviso that the lessee shall not set, let, or assign over the whole or part of the premises without leave in *writing*, will not be affected by an *oral* licence to let part (*h*). But the licence need not be in writing, unless that be expressly required by the terms of the lease; and if when a written licence is necessary, the lessor gives a parol licence on purpose to ensnare the lessee (and that can be proved), a court of equity will relieve on the ground of fraud (*i*), this being an exception to the general rule (*k*). Where lessees, holding

(*d*) Logan *v.* Hall, 4 C. B. 598.

(*e*) Morgan *v.* Slaughter, 1 Esp. 8; Folkingham *v.* Croft, 3 Anst. 700, and see Haberdashers' Co *v.* Isaac, 3 Jur., N. S. 611, Wood, V.-C.

(*f*) Hampshire *v.* Wickens, L. R., 7 Ch. D. 555, and 121, *ante*; Church *v.* Brown, 15 Ves. 258, 271.

(*g*) Crawley *v.* Price, L. R., 10 Q. B. 302; 33 L. T. 203; 23 W. R. 874.

(*h*) Roe *d.* Gregson *v.* Harrison, 2 T. R. 425.

(*i*) Richardson *v.* Evans, 3 Mad. 218.

(*k*) See Hill *v.* Barclay, 18 Ves. 56.

with a covenant not to assign without written consent, sold their interest to a person who entered with the consent of the lessor, but never took a formal assignment, it was held that no breach of the covenant had been committed (*l*).

Vendor must procure licence. — If the vendor of a lease, in which there is a covenant not to assign without licence, contract to assign his interest, it is incumbent on him, *and not on the purchaser, to procure the lessor's [*657] licence for the assignment (*m*); although he seem not to be bound to take legal proceedings to obtain it (*n*). Where A. assigned to B. a lease of a farm from C., which contained a covenant not to assign without C.'s consent, and B. agreed to assign the lease to D.'s nominee, D. to pay the expenses of the assignment and 180*l.* on a certain day for the improvements and manure; to take the crops at a valuation, and to have immediate possession; it was held, that to support an action on this agreement, B. must show that he had obtained C.'s consent to the assignment, though D. had taken possession of the premises, had cut down the crops, and had paid part of the 180*l.* to B. (*o*).

Agreement for sublease. — Where in an agreement for a sublease it was provided that the sublease should contain the like conditions and stipulations as were contained in the original lease, and the original lease contained a covenant not to assign without the lessor's consent, it was held that the sublessor's consent was the consent to be required (*p*).

(*l*) West *v.* Dobb, L. R., 5 Q. B. 450; 39 L. J., Q. B. 190; 23 L. T. 76; 18 W. R. 1167 (Ex. Ch.).

(*m*) Lloyd *v.* Crispe, 5 Taunt. 249; Mason *v.* Corder, 7 Taunt. 9; Barker *v.* Banks, 2 F. & F. 213; Davis *v.* Nisbett, 10 C. B., N. S. 752; 31 L. J., C. P. 6. As to payment of rent upon an agreement for sublease, see Brook *v.* Fletcher, 37 L. T. 100.

(*n*) Lehmann *v.* M'Arthur, L. R., 3 Ch. 496.

(*o*) Mason *v.* Corder, 7 Taunt. 9.

(*p*) Williamson *v.* Williamson, L. R., 9 Ch. 729; 43 L. J., Ch. 738; 31 L. T. 291, C. A.; approved and distinguished in Haywood *v.* Silber, L. R., 30 Ch. D. 404, C. A., in which it was held that on a contract for a sublease, to contain all usual covenants, including a covenant not to assign without the consent of the sublessor, together with the covenants in the original lease (one of which was that the lessee would not assign without the consent of the lessors), the sublessee was bound to submit to the insertion of a covenant not to assign without the head-lessor's consent, — so that two consents would have to be required.

"Running with land." — The covenant not to assign or sublet without licence seems to run with the land, so as to be binding on the assigns of the lessee (*q*).

(b) *Licence to Assign or Sublet.*

Dumpor's case. — The unreasonable doctrine of Dumpor's case, that a licence to assign or sublet operated as a total waiver of the condition against assigning, or subletting, such condition being considered as an entire thing, not capable of being waived or released as to part only (*r*), was never overruled.[1] It was, however, abrogated by statute 22 & 23 Vict. c. 35, which, it will be observed, applies to all kinds of licence. By sect. 1 of this act, "where any licence to do any act which without such licence would create a forfeiture, or give a right to re-enter, under a condition or power reserved in any lease heretofore granted, or to be hereafter granted, shall at any time after the passing of this act be given to any lessee or his assigns, every such licence shall, unless otherwise expressed, extend only to [*658] the *permission actually given, or to any specific breach of any proviso or covenant made or to be made, or to the actual assignment, underlease or other mat-

(*q*) Williams *v.* Earle, L. R., 3 Q. B. 739; 37 L. J., Q. B. 231. But see West *v.* Dobb, L. R., 4 Q. B. 634, and 164, *ante*, as to whether assigns are bound *if not named*.

(*r*) Dumpor's case, 4 Co. R. 119 b; 1 Smith L. C. 41 (7th ed.).

[1] **The effect of a single license to assign in America.** — It has been sometimes held that if lessor consent to a single assignment, the lessee's assignees were thereafter forever free from the covenant not to assign. Murray *v.* Harway, 56 N. Y. 337, 343; Siefke *v.* Koch, 31 How. Pr. (N. Y.) 383; Chipman *v.* Emeric, 5 Cal. 49; Moncure, J., in McKildoe's Ex'r *v.* Darracott, 13 Gratt. 278, 286 (distinguishing cases of assignments and subleases).

Effect of a single icense to sublet. — A single license to sublet or waiver of one act of subletting does not (it has been several times held) authorize a subsequent subletting. McKildoe's Ex's *v.* Darracott, 13 Gratt. 278, 286 (in which Justice Moncure says that the doctrine of Dumpor's case in regard to assignments has not been extended to underleases); Seaver *v.* Coburn, 10 Cush. (Mass.) 324. In Collins *v.* Hasbrouck, 56 N. Y. 157, it was said that consent to sublet for limited term does not authorize sublease for longer term.

Waiver of covenants. — A covenant not to assign is waived by receipt of rent from assignee. Murray *v.* Harway, 56 N. Y. 337; Crouch *v.* Wabash St. L. & Pac. Ry. Co., 22 Mo. App. 315.

ter thereby specifically authorized to be done, but not so as to prevent any proceeding for any subsequent breach (unless otherwise specified in such licence), and all rights under covenants and powers of forfeiture and re-entry in the lease contained shall remain in full force and virtue, and shall be available as against any subsequent breach of covenant or condition, assignment, underlease or other matter not specifically authorized or made dispunishable by such licence, in the same manner as if no such licence had been given; and the condition or right of re-entry shall be and remain in all respects as if such licence had not been given, except in respect of the particular matter authorized to be done."

Licence to one of several, is not licence to co-lessees. — By sect. 2, "where in any lease heretofore granted or to be hereafter granted there is or shall be a power or condition of re-entry on assigning or under-letting or doing any other specified act without licence, and a licence at any time after the passing of this act shall be given to one of several lessees or co-owners to assign or underlet part only of the property, or to do any other such act as aforesaid in respect of part only of such property, such licence shall not operate to destroy or extinguish the right of re-entry in case of any breach of the covenant or condition by the co-lessee or co-lessees, or owner or owners, of the other shares or interests in the property, or by the lessee or owner of the rest of the property (as the case may be), over or in respect of such shares or interests or remaining property, but such right of re-entry shall remain in full force over or in respect of the shares or interest or property not the subject of such licence."

[The third section of this act provides for the apportionment of the condition of re-entry for non-payment of rent in case of severance of reversion. See this section set out ante. Chapter VII., Sect. 4, page 256. As to Waiver, see post. page 662.]

"Arbitrary" refusal to consent. — Where the covenant was not to assign without consent, "such consent not being arbitrarily withheld," it was held, that the effect of these words was not to give the lessee a right of action for an arbitrary

refusal of consent, but merely to allow him, in case of an arbitrary refusal, to assign without consent. And in the same case the majority of the court intimated that a refusal grounded on an expectation that the property would be required by a public body under the Lands Clauses Consolidation Act was not arbitrary (*s*).

[*659] * **Pecuniary consideration for licence.** — The very serious question whether a pecuniary consideration can be required for the licence does not appear to have been considered by the courts, nor does the risk of such consideration being required appear to have been expressly guarded against in the precedents of conveyancers. It is believed that a consideration is very seldom required in practice, but the question whether it is to be requirable is not one which ought to be left in uncertainty when the lease is being settled. Upon the covenant as framed in the unqualified form, it is conceived that the requirement of a pecuniary consideration for the licence is perfectly legal, although it might perhaps be argued that only a reasonable, and not a prohibitory, consideration can be required (*t*).

(c) *Breach of Covenant not to Assign, &c.*

Breach by a lease amounting to an assignment. — A covenant not to *assign* without licence is broken upon the execution by the lessee (without licence) of any deed whereby he parts with the demised premises *for the whole of the residue of his term;* although such deed purports to be merely a lease or sublease for an equal or longer term, at a different rent, payable to himself, and contains other and different covenants and stipulations than those in the original lease (*u*). In

(*s*) Treloar *v.* Bigge, L. R., 9 Ex. 151; 43 L. J., Ex. 95; 22 W. R. 843; followed with approval by Hale, V.-C., in Sear *v.* House Property and Investment Society, L. R., 16 Ch. D. 387; 50 L. J., Ch. 77; 43 L. T. 531; 29 W. R. 192, in which the words were "but such consent not to be unreasonably withheld." But see Shepheard *v.* Hong Kong, &c. Corporation, 20 W. R. 459, *per* Malins, V.-C.

(*t*) See Hilton *v.* Tipper, 18 L. T. 626; 16 W. R. 888, and *ante*, 247. The words "such consent not being arbitrarily withheld," or like words, are now frequently inserted, and it is conceived that they exclude a pecuniary consideration.

(*u*) *Ante*, Ch. VII., Sect. 4.

order that an assignment shall create a forfeiture, the instrument must be valid and effectual in point of law and not void as an act of bankruptcy (*x*).

Advertisement. — An advertisement to sublet or assign is not a breach of contract, if no actual sublease or assignment be made (*y*).

Breach by a sublease. — A covenant not to assign or otherwise part with the premises, or any part thereof, for the whole *or any part of the term*, is broken by a sublease (*z*); but a covenant "not to assign, transfer, set over, or otherwise do or put away the lease or premises," is not (*a*). A covenant against subletting will restrain an assignment (*b*).

Letting lodgings. — Letting lodgings has been held not to be a breach of a covenant not "to grant any under-lease for any term whatsoever, or let, assign, transfer, set over, or otherwise part with" without the licence of the lessor; for "the covenant," said Lord Ellenborough, "can only extend to such under-letting as a licence might be expected to * be applied for; and whoever heard of a licence [*660] from a landlord to take in a lodger?" (*c*). But the same learned judge ruled otherwise where the covenant was not to let the premises, or any part thereof (*d*), and the ruling itself has been questioned in a later case (*e*), where land was suffered to be occupied by more persons than one. On principle it would seem that if the covenant be not to sublet the premises or any *part*, the letting lodgings would be a breach, otherwise not.

Equitable mortgage by deposit of lease. — A covenant "not to alien, sell, assign, transfer, set over or otherwise part with

(*x*) Doe *d.* Lloyd *v.* Powell, 5 B. & C. 308; 2 Y. & J. 372.

(*y*) Gourley *v.* Duke of Somerset, 1 V. & B. 68.

(*z*) Doe *d.* Holland *v.* Worsley, 1 Camp. 20; Cole Ejec. 435.

(*a*) Crusoe *d.* Blencowe *v.* Rugby, 2 W. Blac. 766; 3 Wils. 234; Kinnersley *v.* Orpe, 1 Doug. 55; Church *v.* Brown, 15 Ves. 258.

(*b*) Greenaway *v.* Adams, 12 Ves. 395.

(*c*) Doe *d.* Pitt *v.* Laming, 4 Camp. 77. As to whether letting lodgings is a "trade," see 665, *post*.

(*d*) Roe *v.* Sales, 1 M. & S. 297.

(*e*) Greenslade *v.* Tapscott, 1 Cr., M. & R. 59, *per* Parke, B. Both in Pitt *v.* Laming and Roe *v.* Sales exclusive possession was granted.

the lease or premises" was ruled, before the Judicature Act, not to be broken by a deposit of the lease as a security for a loan (*f*); but the effect of section 24 of that act would seem to be to alter the law in this respect.

Assignment by operation of law — no breach. — An assignment by operation of law, and not by the voluntary and immediate act of the party, as where leasehold premises are assigned to a railway company under the compulsory powers of their act (*g*), is no breach of a covenant against alienation. A lease taken in execution on a warrant of attorney to confess a judgment given by the lessee, is not a forfeiture of the lease under a covenant by such lessee "not to let, set, assign, transfer, make over, barter, exchange, or otherwise part with the indenture, &c., for there is a distinction between those acts which a party does voluntarily, and those which pass in invitum (*h*); but where it was found by a verdict, that the tenant gave such a warrant of attorney to a creditor for the express purpose of enabling such creditor to take the lease in execution under the judgment, it was held to be in fraud of the covenant; and the landlord, under the clause of re-entry, recovered the premises in ejectment from a purchaser under the sheriff's sale (*i*). Where a lease contained a clause of re-entry, in case the term should be extended or taken in execution, and the sheriff entered the premises during the term, under a writ of extent against the lessee at the suit of the crown, held an inquisition, and seized the lessee's interest into the King's hands; it was held, that this was a taking in execution within the latter clause of the proviso, and therefore that the term was forfeited (*k*).

[*661] * **Bankruptcy of lessee.** — Where the lessee becomes a bankrupt, the operation of the Bankruptcy Law, by

(*f*) Doe *d.* Pitt *v.* Hogg, 4 D. & R. 226; 1 C. & P. 160, *per* Abbott, C. J., whose ruling was upheld by the court. As to effect of equitable mortgage of lease, see Moores *v.* Choat, 8 Sim. 508, and *ante*, 263.

(*g*) Slipper *v.* Tottenham and Hampstead Junction R. Co., L. R., 4 Eq. 112, 114; 36 L. J., Ch. 841. And see Baily *v.* De Crespigny, L. R., 4 Q. B. 180.

(*h*) Doe *d.* Mitchinson *v.* Carter, 8 T. R. 57; Croft *v.* Lumley, 6 H. L. Cas. 672; 27 L. J., Q. B. 321.

(*i*) Doe *d.* Mitchinson *v.* Carter, 8 T. R. 300.

(*k*) Rex *v.* Topping, M'Clel. & Y. 544.

which the property becomes vested in the trustees in bankruptcy, does not create a breach of the contract against alienation without licence (*l*); and what is more, the trustees in bankruptcy have a right to assign the lease over (*m*). But a lease may be made subject to a proviso for re-entry by the lessor, in the event of the lessee becoming bankrupt; and such proviso is valid as against his trustee (*n*).

Marriage of lessee. — The marriage of a female lessee was no breach of a condition against alienation (*o*), even before the Married Women's Property Act, 1882.

Bequest of the term. — Whether a bequest of the term (to any other person than the lessee's executor) is a breach of the covenant not to assign without licence is a point not precisely determined by authority. Where the lessee, having covenanted "not to assign over the term without the lessor's consent first had in writing," bequeathed the term without any such consent obtained, it was held not to be such an assignment as was a breach of the covenant (*p*). And in a later case, Bayley, J., treated it as settled that "a device of the term by the lessee is not a breach of the covenant not to assign" (*q*). But the contrary has no doubt been held (*r*). On principle it would seem that the opinion of Bayley, J., is correct: that assignment and such like words apply only to transfer *inter vivos;* and that if the lessor desire to exclude a specific devise of the term, he must do so by express words (*s*). In any event the whole estate of the lessee is liable for breaches of covenant, &c.

Assignment by one partner to another. — If two partners be

(*l*) Wadham *v.* Marlow, 1 H. Blac. 438, n.; 8 East, 314, n.; 4 Doug. 54.

(*m*) Doe *d.* Goodbehere *v.* Bevan, 3 M. & S. 353, 360, 361. See *ante*, 276.

(*n*) Roe *d.* Hunter *v.* Galliers, 2 T. R. 133. See Ch. VII., Sect. 11, p. 274.

(*o*) Anon., Moor, 21.

(*p*) Fox *v.* Swann, Style, 483.

(*q*) Doe *d.* Goodbehere *v.* Bevan, 3 M. & S. 353. In Doe *d.* Evans *v.* Evans, 8 A. & E. 719, the point was argued on one side only (that the bequest was a breach), and the court abstained from saying anything about it.

(*r*) See Bac. Abr. tit. *Leases*, p. 886; Berry *v.* Taunton, Cro. Eliz. 331; Dumper *v.* Syms, Id. 815, and other cases cited, Cole Ejec. 437.

(*s*) In Lloyd *v.* Crispe, 5 Taunt. 549, express words *allowed* a specific devise.

assignees of a lease containing a covenant not to assign without licence, it is a breach of this covenant for one of them to assign all his interest to the other, and such an assignment is not authorized by the original licence to the lessee to assign to the two (*t*); but where there was a lease to two partners as joint tenants, with a covenant not to assign or part with possession without consent of the lessor, and upon dissolution one of the partners remained in sole possession, intending to take an assignment which was not in fact executed, it was held that there was no breach of the covenant (*u*).

[*662] * **Evidence of assignment.** — Where the covenant was, not to assign the whole or any part of the lands demised without the lessor's consent, and the lessor entered into part himself, and then the lessee assigned; it was held to be a breach of the covenant, notwithstanding the lessor's entry (*x*). Suffering, without consent, persons to use portions of the land for the purpose of raising a potato crop, is a breach of the stipulation not to suffer any part of the land to be occupied by any other person, without the consent of the landlord, although it be proved to be the custom of the country for farmers to pursue that course (*y*). It was at one time held, that where there is a right of re-entry upon assignment or subletting, if a person be found on the premises appearing as tenant, it is primâ facie evidence of a subletting, and that the defendant must show, whether the person was a tenant or merely a servant (*z*); but it has since been decided that it is not sufficient to prove the defendant, a stranger, in possession of the demised premises, and his declaration that they were demised to him by another stranger, even if the tenant had covenanted not to part with the possession (*a*).

(*t*) Varley *v.* Coppard, L. R., 7 C. P. 505; 26 L. T. 882; 20 W. R. 972.

(*u*) Corporation of Bristol *v.* Westcott, 12 Ch. D. 461; 41 L. T. 117; 27 W. R. 841, C. A., affirming decision of Bacon, V.-C. The consent of the lessor had been stipulated for between the partners on dissolution, but had not in fact been applied for.

(*x*) Collins *v.* Sillye, Style, 265.

(*y*) Greenslade *v.* Tapscott, 1 C., M. & R. 55.

(*z*) Doe *d.* Hindley *v.* Rickarby, 5 Esp. 4.

(*a*) Doe *v.* Payne, 1 Stark. R. 86. As to the effect of Declarations by Occupiers, see Cole Ejec. 232.

(d) *Waiver of Forfeiture.*

By acceptance of subsequent rent. — Where a forfeiture has been incurred by breach of a covenant against alienation, the receipt of rent which becomes due at a later period will amount to a waiver of the forfeiture, if the lessor then knows of the breach (*b*).[1] In an ejectment for breach of a condition not to sublet, it was proved that the plaintiff asked the defendant what he would take for his land, and on the defendant naming a price, said, "Then let it, and I shall know what it will produce next year." It was held, that this was a waiver of the forfeiture, for breach of such condition (*c*).

Restriction on effect of waiver of forfeiture. — By 23 & 24 Vict. c. 38, s. 6, "where any actual waiver of the benefit of any covenant or condition in any lease, on the part of the lessor, or his heirs, executors, administrators or assigns, shall be proved to have taken place after the passing of this act in any one particular instance, such actual waiver shall not be assumed or deemed to extend to any instance or any breach of covenant or condition other than that to which such waiver shall specially relate, nor to be a general waiver of the benefit of any such covenant or condition, unless an intention to that effect shall appear." Before this enactment a lessor * who had a right of re-entry on the breach of [*663] a covenant not to sublet, did not, by waiving his right on one subletting lose his right to re-enter on a subsequent subletting (*d*).

No relief against forfeiture. — Forfeiture on the ground of a breach of "covenant or condition against the assigning, underletting, parting with the possession, or disposing of the land leased" cannot be relieved against under s. 14 of the Conveyancing Act (*e*).

(*b*) Roe *d.* Gregson *v.* Harrison, 2 T. R. 425; Harvie *v.* Oswel, Cro. Eliz. 572; Goodright *d.* Walter *v.* Davids, Cowp. 803.

(*c*) Doe *d.* Henniker *v.* Watts, 8 B. & C. 308.

(*d*) Doe *d.* Boscawen *v.* Bliss, 4 Taunt. 735.

(*e*) *Ante*, 329, 330.

[1] See *ante*, (*b*), note, and *ante*, ch. 8, sec. 5, (*f*), note, "Waiver," and (*a*), note, "Forfeiture clauses."

Sect. 3. — *For Residence on the Premises.*

Effect of covenant to reside. — A covenant by the lessee to reside constantly upon the demised premises, is sometimes inserted in leases, especially in agricultural leases, and a lease for so long as the lessee continues to occupy becomes forfeited upon his ceasing to occupy (*f*). Such a covenant has been recognised as a fair and proper covenant (*g*); but it certainly is not a common covenant[1] or condition, except in agricultural leases. It runs with the land into whosesoever hands it comes; and is therefore binding upon assigns, although they be not mentioned (*h*).

Sect. 4. — *For or against Particular Trades.*[2]

Effect of covenant against particular trades. — In leases of houses in towns a covenant is frequently inserted, to restrain the lessee from carrying on or permitting or suffering the premises to be used for carrying on obnoxious trades. The real object in all these cases is to prevent the lowering of the tenement in the scale of houses, by the exercise, whether

(*f*) Doe *d.* Lockwood *v.* Clarke, 8 East, 185; see also Doe *d.* Duke of Norfolk *v.* Hawke, 2 East, 481.

(*g*) Ponsonby *v.* Adams, 2 Bro. P. C. 431.

(*h*) Tatem *v.* Chaplin, 2 H. Blac. 133; Sewell, app., Taylor, resp., 7 C. B., N. S. 160. See *ante*, 162.

[1] A covenant to personally occupy the premises is not an ordinary covenant. Clark *v.* Clark, 49 Cal. 586, 589.

[2] **Covenants for and against certain trades, etc.** — A covenant that premises shall be used for regular dry goods jobbing business is broken by carrying on the business of an auctioneer in them. Steward *v.* Winter, 4 Sand. Ch. (N. Y.) 587. A recital in lease that premises are to be used as a timber yard was held an express covenant not to use them for other purposes in De Forest *v.* Byrne, 1 Hilt. (N. Y.) 43. A lease of premises to a lodge of Good Templars for lodge purposes is broken if one of their number establishes a justice's court upon them. Farwell *v.* Easton, 63 Mo. 446.

A covenant not to let any other mill-sites on same stream for sawing mahogany is broken by giving an unrestricted lease (from the time when second lessee establishes his mill). Norman *v.* Wells, 17 Wend. (N. Y.) 136.

Injunction. — This covenant may be enforced by injunction. Dodge *v.* Lambert, 2 Bosw. (N. Y.) 570 (covenant that demised premises should not be used as a grocery or for selling liquor).

wholly or partially, of those trades which, in the judgment of the lessor, are likely to [be a nuisance to the neighbourhood, or to] prevent tenants from afterward taking the premises, and which by so doing may depreciate their value at a future period (*i*).

Covenants against trade run with the land. — Such covenants affect the occupier of the demised premises, and run with the land so as to bind "assigns" not therein mentioned (*k*), or at all events so as to bind in equity assigns who have actual or * constructive notice of them (*l*). But [*664] a covenant by the lessor not to build a public-house within half a mile of the demised premises does not run with the land, and cannot be sued on by assignees of the lease (*m*). Any such covenant must be fortified by a proviso for re-entry, otherwise the breach of it will not support an ejectment, but only an action for damages (*n*), or claim for a writ of injunction (*o*).

How far "usual covenants." — Covenants in restraint of trade in a trading locality are not generally considered usual covenants (*p*); but whether they are so or not is a question of fact, and where the defendant agreed to purchase the lease of a public-house described as held "under common and usual covenants," and the lease was found to contain a proviso for re-entry upon any business but that of a publican being carried on, the plaintiff succeeded in enforcing the agreement upon evidence that the proviso for re-entry was inserted in at least six out of ten leases of public-houses (*q*). A person agreed to take land for ninety years at a certain rent, and to build glass-houses, and *not to use* the premises for any other purpose than a glass manufactory; it was held,

(*i*) See Gaskell *v.* Spry, 1 B. & A. 619.

(*k*) Wilkinson *v.* Rogers, 2 De Gex, J. & S. 62; 12 W. R. 119, 284.

(*l*) Jay *v.* Richardson, 30 Beav. 563; Wilson *v.* Hart, L. R., 1 Ch. App. 463; 13 W. R. 988; Catt *v.* Tourle, L. R., 4 Ch. App. 654; 38 L. J., Ch. 655. See *post*, 665.

(*m*) Thomas *v.* Hayward, L. R., 4 Ex. 311; 38 L. J., Ex. 175; 20 L. T. 814.

(*n*) Cole Ejec. 432.

(*o*) See Wilson *v.* Hart and Catt *v.* Tourle, *supra*.

(*p*) Wilbraham *v.* Livesey, 18 Beav. 206; Probert *v.* Parker, 3 Myl. & K. 280, and see 120, *ante*.

(*q*) Bennett *v.* Womack, 3 C. & P. 96; 7 B. & C. 627.

that this agreement did not warrant the insertion of a covenant in the lease, compelling the tenant *to carry on* the business of a glass manufacturer during the whole term (*r*). A promise cannot be implied, from the mere fact of a lessee having entered into an agreement for a sub-tenancy, that he had power to let "without restriction as to the purposes for which the premises should be used" (*s*).

Illegal trades. — A lease made for the express purpose of using the premises to boil oil and tar, contrary to the provisions of the Building Act (25 Geo. 3, c. 77) was held void, though the intended use of the premises was not mentioned in the lease (*t*). So where a house is knowingly let or assigned for the purposes of a brothel, although it contains an express covenant not to use it as a brothel (*u*). Where A. procured B. to grant him a lease of premises, by means of a false representation that he intended to carry on a certain lawful trade therein, and having obtained possession, converted the premises into a common brothel, whereupon B. forcibly expelled him; it was held, that A. might maintain ejectment; [*665] the fraudulent misrepresentation and the *subsequent illegal use of the premises not being sufficient at law to avoid the lease (*x*).

Covenant against buildings. — The erection of wooden hoardings for the purpose of advertisement is a breach of a covenant not to "erect or make any building or erection on any part of the demised premises" (*y*).

Covenant for private house. — The putting up of a blind in a window with the words "A. B. Coal Office," is a breach of a covenant to use the house as a private dwelling-house only (*z*), and putting up a similar blind or brass plate is a breach of a covenant not "to affix any outward mark or show of business" (*a*). The covenant to use as a private

(*r*) Doe *d.* Marquis of Bute *v.* Guest, 15 M. & W. 160.

(*s*) Jackson *v.* Cobbin, 8 M. & W. 790; 1 Dowl., N. S. 96.

(*t*) Gaslight Co. *v.* Turner, 5 Bing. N. C. 666; 6 Id. 324.

(*u*) Smith *v.* White, L. R., 1 Eq. 626; 35 L. J., Ch. 454.

(*x*) Feret *v.* Hill, 15 C. B. 207; and see E., B. & E. 814, 815.

(*y*) Pocock *v.* Gilham, 1 C. & E. 104, *per* Mathew, J.

(*z*) Wilkinson *v.* Rogers, 2 De Gex, J. & S. 62; 10 Jur., N. S. 5, 162; 12 W. R. 119, 284.

(*a*) Evans *v.* Davis, L. R., 10 Ch.

dwelling-house only is also broken by the erection of a studio "with necessary rooms connected therewith" in the garden (*b*).

A covenant that no buildings except dwelling-houses shall be built on land, has been held broken by the erection of a wall (*c*), but not by the erection of a stable with a bedroom over it (*d*).

Lodging-house. — We have seen (*e*) to what extent the letting of lodgings is a breach of a covenant not to sublet; it does not seem to be settled by any case how far such a letting is a breach of a covenant not to exercise a business, &c., but it is submitted that although much may often depend on the wording of a covenant and the particular facts, the majority of covenants against business, &c., would be so construed to bar the letting of lodgings as ordinarily carried on.

Auction. — A covenant to use a house as a private house only is not broken by a sale by auction of the furniture of the house (*f*).

Lessee bound by restrictive covenants of lessor. — "Constructive notice" may bind the lessee by the restrictive covenants of his lessor, although he has no actual knowledge of them. Thus, where a house was granted to B. in fee, and A. covenanted with the grantor that he would not use it "as an inn, public-house, or tap-room, or for the sale of spirituous liquors or beer," and afterwards demised the house to B., who sold wine and spirits in bottle as a grocer, it was held, that though B. had no knowledge of A.'s covenant with the grantor he was put upon inquiry, was fixed with constructive notice of the covenant, and could be restrained by injunction from selling *spirits* (*g*). And in one case Jessel, M. R., * went so far as to say that even [*666] an express representation by a lessor that there were

D. 747; 48 L. J., Ch. 223; 39 L. T. 391; 27 W. R. 285.

(*b*) Patman *v.* Harland, L. R., 17 Ch. D. 353; 50 L. J., Ch. 642; 44 L. T. 728; 29 W. R. 707, *per* Jessel, M. R., who said however that "a fair and reasonable adjunct" might be erected.

(*c*) Bowes *v.* Law, K. R., 9 Eq. 636; 39 L. J., Ch. 433; 22 L. T. 267; 18 W. R. 640. (Damages only awarded, as no substantial injury.)

(*d*) Russell *v.* Baber, 18 W. R. 1021.

(*e*) *Ante*, 660.

(*f*) Reeves *v.* Cattell, 24 W. R. 485.

(*g*) Fielden *v.* Slater, L. R., 7 Eq. 523; 38 L. J., Ch. 379; 20 L. T. 112; 17 W. R. 485.

no restrictive covenants affecting the demised property would not do away with the effect of "constructive notice" (*h*).

Sublessee bound by restrictive covenants of head landlord. — On similar principles, it has been held that a sublessee is bound by the restrictive covenants entered into by a head landlord when he purchased the freehold, although neither the mesne landlord nor the sublessee has actual notice of them (*i*).

Covenant against trade of butcher. — A covenant in a lease, that the lessee shall not exercise the trade of a butcher upon the premises, is broken by selling there raw meat by retail, although no beasts are slaughtered (*k*). So a covenant not to carry on the business of a pork-butcher on the demised premises, nor to use them for the sale of pork, is broken by the exposure there of carcasses of pigs for sale, although such carcasses are cut up and contracts for the sale thereof completed elsewhere in the neighbourhood (*l*).

School. — Where a lessee of a house and garden covenanted with the lessor not to use or exercise, or permit or suffer to be used or exercised, upon the demised premises, or any part thereof, any trade or business whatsoever, &c., without the licence of the lessor, &c., and afterwards, without the licence of the lessor, assigned the lease to a schoolmaster, who carried on his business in the house and premises; it was held that such assignment was a breach of the covenant (*m*). But a school has been held not to be a nuisance within the meaning of a general covenant against nuisances (*n*). A covenant not to carry on "any public business" in a house, but that it should "be used solely as a private dwelling-house," is broken by using it as a day-school and dancing academy, notwithstanding that the next-door neighbours make no complaints (*o*), and in German *v.*

(*h*) Patman *v.* Harland, L. R., 17 Ch. D. at p. 356, and *ante*, 665, note (*b*). See also Nicoll *v.* Jenning, 30 W. R. 95.

(*i*) Thornewell *v.* Johnson, 50 L. J., Ch. 641; 44 L. T. 768.

(*k*) Doe *d.* Gaskell *v.* Spry, 1 B. & A. 617.

(*l*) Doe *d.* Davis *v.* Elsam, Moo. & M. 189.

(*m*) Doe *d.* Bish *v.* Keeling, 1 M. & S. 95; Kemp *v.* Sober, 1 Sim., N. S. 517.

(*n*) Harrison *v.* Good, L. R., 11 Eq. 338; 40 L. J., Ch. 294; 24 L. T. 263; 19 W. R. 346.

(*o*) Wickenden *v.* Webster, 6 E. &

Chapman (*p*) it was held by the Court of Appeal that a covenant — of even date with a conveyance of sale — that no building to be erected on the four acre plot of land sold "should be used or occupied otherwise than as a private residence only, and not for any purpose of trade" was broken by the erection of a boarding-school large enough to accommodate 100 girls, but supported by voluntary contributions, being an "Institution for the Education of the Daughters of * Missionaries." Rolls *v.* Miller (*q*), [*667] in which the words were "trade or business," is to the like effect.

Hospital. — A hospital, the patients of which make small payments according to their means, is a "business" within a covenant by lessee "not to carry on any trade, business or dealing whatsoever, or anything of the nature thereof" upon the demised premises (*r*). This was held in a case where the hospital was a "throat and chest" hospital, and the covenant also contained the words, "or suffer any act or thing which may be or grow to the annoyance, damage, injury, prejudice, or inconvenience of the neighbouring premises." Upon these words also there was held to have been a breach of the covenant, so that the case may be supported on another ground. The injunction granted was "not to be enforced for two months." Similarly, the user of a house for a hospital association, established without a view to profit, to provide accommodation for patients able and willing to pay for it, is an infringement of a covenant not to use the house for the exercise "or carrying on of any art, trade or business, occupation or calling" (*s*).

Shop. — A covenant not to convert a dwelling-house into a shop means a structural conversion, and not merely exposing goods for sale (*t*).

B. 387; Johnstone *v.* Hall, 2 K. & J. 414; 25 L. J., Ch. 462.

(*p*) L. R., 7 Ch. D. 271; 47 L. J., Ch. 250; 37 L. T. 685; 26 W. R. 149, C. A., reversing decision of Bacon, V.-C., 37 L. T. 265.

(*q*) Rolls *v.* Miller, 27 Ch. D. 71; 53 L. J., Ch. 682; 50 L. T. 597; 32 W. R. 806, C. A. (Home for Working Girls).

(*r*) Bramwell *v.* Lacy, L. R., 10 Ch. D. 691; 48 L. J., Ch. 339; 40 L. T. 361; 27 W. R. 463, *per* Jessel, M. R.

(*s*) Portman *v.* Home Hospitals Association, L. R., 27 Ch. D. 81, n.; 50 L. T. 599, *per* Jessel, M. R.

(*t*) Wilkinson *v.* Rogers, 2 De Gex, J. & S. 62; 12 W. R. 119, 284.

"**Offensive trade.**" — A lease containing a covenant not to carry on certain specified trades or businesses, or "any offensive trade," is not forfeited by using the premises as a private lunatic asylum (*u*), or for the business of a licensed victualler (*x*), or for the deposit of lucifer matches (*y*).

"**Business.**" — Payment by inmates to the lessee is not essential to constitute a business; nor does payment necessarily make that a business which without payment would not be a business (*z*).

Sale of beer, &c. — Carrying on the business of a "retail brewer" has been held to be no breach of a covenant not to carry on the business of a common brewer or retailer of beer (*a*). More recently, a covenant made in 1854 not to use the trade or calling of a seller by retail of "wine, beer, spirits or spirituous liquors," was held not to be broken by the sale of wine and spirits in bottle by a grocer, under an act passed in 1861 (24 & 25 Vict. c. 21), on the ground that, at the time the covenant was made, this would not have been a selling by retail (*b*).

[*668] * **Application of beer acts, &c.** — It is expressly provided by statute that any covenant in a lease "between any landlord and tenant" against the trade of a victualler or publican being carried on "in any house mentioned or comprised" in the lease, or against the house being used as a "public house or ale house," shall apply to every person licensed to sell beer or cider under the Beer Act, 1830 (*c*), and likewise to every person licensed to sell wine *to be consumed on the premises* under the Wine Act, 1860 (*d*).

"**Vintner.**" — The expression "vintner" in such a covenant has been held to apply to a person selling wine not to be drunk on the premises (*e*).

(*u*) Doe *d.* Wetherell *v.* Bird, 6 C. & P. 195; 2 A. & E. 161.

(*x*) Jones *v.* Thorne, 1 B. & C. 715.

(*y*) Hickman *v.* Isaacs, 4 L. T. 285. Here the works were "noisome or offensive."

(*z*) Rolls *v.* Miller, 27 Ch. D. 71, *ante*, note (*q*).

(*a*) Simons *v.* Farren, 1 Bing. N. C. 126, 272.

(*b*) Jones *v.* Bone, L. R., 9 Eq. 674; 39 L. J., Ch. 405; 23 L. T. 304; 18 W. R. 489; distinguishing Fielden *v.* Slater, *supra*, 665. See also Pease *v.* Coats, L. R., 2 Eq. 688.

(*c*) 1 Will. 4, c. 64, s. 31.

(*d*) 23 Vict. c. 27, s. 44.

(*e*) Wells *v.* Attenborough, 24 L. T. 312.

Beer-shop and beer-house. — A covenant not to use a house as a *beer-shop* or public-house has been held to be broken by the sale of beer *not to be drunk on the premises* (*f*), to which kind of sale, however, a covenant not to use a house as a *beer-house* had previously been held not to extend (*g*), and has also subsequently been held not to extend (*h*). In construing a covenant not to carry on any offensive trade or business on premises demised, much will depend on the situation of the premises: and it is particularly worthy of consideration, whether such trade as that complained of was carried on there at the time of the demise; for if it were, it could scarcely be thought to come within the covenant (*i*).

Theatrical covenant. — In Croft *v.* Lumley, a lease of the Opera House contained a covenant on the part of the lessee not to use the house for any but purposes of a theatrical kind, and "to use his best endeavours to improve" the house for that purpose. The house was closed at the end of the season of 1852, and was not opened at all during the following year. It was held by the House of Lords that this was not a breach of the covenant (*k*).

Post-office. — And a covenant to use the demised premises "as a post-office and not for any other purpose," was held not to be broken by the issue of Inland Revenue licences under the authority of 32 & 33 Vict. c. 14, s. 18 (*l*).

Waiver of forfeiture. — If a lessee exercise a trade upon the demised premises, by which his lease is forfeited, the landlord does not, by merely lying by and witnessing the act for six years, waive the forfeiture, some positive act of waiver

(*f*) St. Albans (Bishop of) *v.* Battersby, 3 Q. B. D. 359; 47 L. J., Q. B. 571; 38 L. T. 685; 26 W. R. 678; affirmed in London and Suburban Co. *v.* Field, C. A., 16 Ch. D. 645; 44 L. T. 444.

(*g*) London and North Western R. Co. *v.* Garnett, L. R., 9 Eq. 26; 39 L. J., Ch. 25; 21 L. T. 352; 18 W. R. 246.

(*h*) Holt *v.* Collyer, L. R., 16 Ch. D. 718; 50 L. J., Ch. 311; 44 L. T. 211; 29 W. R. 502, *per* Fry, J.

(*i*) Gutteridge *v.* Maynard, 7 C. & P. 129, *per* Tindal, C. J.

(*k*) Croft *v.* Lumley, 6 H. L. Cas. 672; 27 L. J., Q. B. 321.

(*l*) Wadham *v.* Postmaster-General, 24 L. T. 545. And see Doe *v.* Churchwardens of Rugeley, 6 Q. B. 107, where a covenant to use a house as a poor-house only, was held not to be broken by ceasing so to use it after the passing of the Poor Law Amendment Act, which compelled the non-user.

being necessary; but if he permit the tenant to ex-
[*669] pend money * in improvements to adapt them to that trade, it would be evidence for the jury of his consent to their being so used (*m*). If rent be received for twenty years, with full knowledge of the breach of covenant, and without any objection, a licence *under seal* may be presumed and found by the jury (*n*). Where there is a covenant against carrying on a particular trade without a written licence, the mere fact of the lessor's suffering the tenant to carry on one trade on the premises will not afterwards authorize his carrying on another without a written licence (*o*).

Continuing breach. — A covenant not to carry on or suffer upon the demised premises during the term any specified trades or businesses, or any trade or business whatever, is a covenant of a *continuing nature*, and broken from day to day so long as any prohibited trade or business is carried on (*p*); but where a plumber was found to be in occupation of the demised premises, and the landlord had received two quarters' rent with knowledge of the occupation, it was said that the waiver by receipt of rent must be taken to extend to some *term*, and that the plumber must be supposed to have had at least a tenancy from year to year, so that an ejectment could not be sustained (*q*).

Covenants to work mines. — An agreement to work a mine as long as it is "fairly workable," does not oblige the tenant to work it at a dead loss (*r*), nor does a covenant to "get the demised clay to the fullest practicable extent consistent with the means of sale of bricks and tiles to be derived therefrom," although a means of sale at an unremunerative rate might be found (*s*), but an agreement to work "in the most proper and effective manner" is broken by a cessation from working,

(*m*) Doe *d.* Sheppard *v.* Allen, 3 Taunt. 78; Doe *d.* Boscawen *v.* Bliss, 4 Taunt. 735; Doe *d.* Bryan *v.* Bancks, 4 B. & A. 401.

(*n*) Gibson *v.* Doeg, 2 H. & N. 615; 27 L. J., Ex. 37; Bridges *v.* Longman, 24 Beav. 27.

(*o*) Macher *v.* Foundling Hospital, 1 V. & B. 188; 23 & 34 Vict. c. 38, s. 6.

(*p*) Doe *d.* Ambler *v.* Woodbridge, 9 B. & C. 376; Cole Ejec. 433.

(*q*) Griffin *v.* Tomkins, 42 L. T. 459; see Walrond *v.* Hawkins, L. R., 10 C. P. 42, *ante*, for the *ratio decidendi* of this case.

(*r*) Jones *v.* Shears, 7 C. & P. 346.

(*s*) Newton *v.* Nock, 43 L. T. 197, *per* Denman, J.

although the dead rent be paid (*t*). "Coal seams workable as coal seams," means workable at a profit, including the coal and fire clay, &c. to which the tenant is entitled (*u*). Where lessees of mines entered into an absolute unqualified covenant to get 2,000 tons of rock salt in each year during the continuance of the term, or pay for the deficiency: held, that they were liable, whether the salt could be got easily or with difficulty, and that whether it existed at all was immaterial (*x*). So, where lessees of a mine had covenanted with all reasonable diligence *to sink the [*670] shafts down to the salt: held, that they were bound to do so, although it might be an unreasonable application of time and labour (*x*). So, where the lessees of a mine covenanted to work it during the continuance of the term in a proper and workmanlike manner, it was held, that they must be taken to have covenanted to work the mine *in some way*, in as prudent and proper a manner as they could under the circumstances, and therefore had no right to abandon the works altogether, notwithstanding that the mine was drowned by an influx of brine, which rendered it impossible to work the mine at a profit (*x*). A lessee of iron mines covenanted to work them, unless prevented by accident or want of materials, or unless the ironstone should be insufficient in quantity or quality, or would not by itself, or with a proper mixture or process, make good common pig-iron. It was held, that the mixture intended was not necessarily of ingredients procurable on the demised premises (*y*). In another case, there was a demise of all mines which had been, or during the demise should be, discovered or open under certain lands, and there was a covenant by the lessee that he would work the said mines in a proper and workmanlike manner; and it was held, that no action lay on the covenant if the mines had never been worked either before or since

(*t*) Kinsman *v.* Jackson, 42 L. T. 80, affirmed Ib. 558. The dictum of Malins, V.-C., in Wheatley *v.* Brymbo Coal Co., L. R., 9 Eq. 538, that it is enough if the dead rent be paid, would seem not to be law. See *per* Jessel, M. R., 42 L. T. 558.

(*u*) Carr *v.* Benson, L. R., 3 Ch. App. 524.

(*x*) Jervis *v.* Tomkinson, 1 H. & N. 195.

(*y*) Foley *v.* Addenbrooke, 13 M. & W. 174.

the demise (*z*). On the construction of a proviso that the lease should be void if the tenant ceased working at any time for two years, it was held, that a fraudulent working for a short time would not prevent a forfeiture (*a*).

Public-house covenants. — Where a lessee covenanted to use his utmost endeavours to continue the house open as a public-house, and the licence was taken away by the magistrates on account of the disorderly conduct of a subtenant, and was not renewed for six years, when the lease expired; it was held, that the covenant was broken, because the lessee had done no act to endeavour to get the licence renewed (*b*). But there is no implied covenant by the lessee of a public-house that he will do no act whereby the licence shall become forfeited (*c*); and even an express covenant that the lessee would do no act which could or might "affect, lessen, or make void" the licence was held not to be broken by a conviction of the lessee which might have been but was not recorded on his licence under the Licensing Acts (*d*). Moreover, an agreement not to do anything to "imperil" the licence of a beer house has been held not to be broken by the mere ab-
[*671] sence of the * licensee away at sea (*e*). A stipulation for similar covenants to those of an old lease will not, if a licence has become forfeited, entitle the intending landlord to a covenant to procure a licence, but only to a covenant for best endeavour to obtain and keep up one (*f*).

Protection of landlord under licensing acts. — It may be here stated that, by sect. 56 of the Licensing Act, 1872 (35 & 36 Vict. c. 94), "where any tenant of any licensed premises is convicted of an offence" against that act, and such offence is one, the repetition of which may render the premises liable to be disqualified from receiving a licence for any period," the clerk of the peace is bound to serve notice of the conviction upon the owner of the premises. By the same section, the

(*z*) Quarrington *v.* Arthur, 10 M. & W. 335.

(*a*) Doe *d.* Bryan *v.* Bancks, 4 B. & A. 401; Gow. 220.

(*b*) Linder *v.* Prior, 8 C. & P. 518.

(*c*) Maw *v.* Hindmarsh, 28 L. T. 644.

(*d*) Wooler *v.* Knott, L. R., 1 Ex. D. 265; 45 L. J., Ex. 313; 34 L. T. 362; 24 W. R. 1004 (C. A.).

(*e*) Moore *v.* Robinson, 48 L. J., Q. B. 156, *per* Lush, J.

(*f*) Shepheard *v.* Walker, 34 L. T. 230.

owner may appeal to petty sessions against a disqualification of the licensed premises on the grounds only — (1) "that the required notice has not been served;" (2) "that the tenant by whom the offence was committed held under a contract made prior to the commencement of the act, and that the owner could not legally have evicted the tenant in the interval between the commission of the offence, in respect of which the disqualifying order was made, and the receipt by him of the notice of the immediately preceding offence which on repetition renders the premises liable to be disqualified from receiving a licence at any period;" or (3) "that the offence in respect of which the disqualifying order was made occurred so soon after the receipt of such last-mentioned notice that the owner, notwithstanding he had legal power to evict the tenant, could not with reasonable diligence have exercised that power in the interval which occurred between the said notice and the second offence."

Temporary authority for landlord to sell. — Moreover, by sect. 15 of the Licensing Act, 1874 (37 & 38 Vict. c. 49), a temporary authority may be obtained by or on behalf of the landlord of licensed premises to carry on the business in case of the licence of the tenant being declared forfeited on conviction of felony, or of certain offences against the licensing acts therein mentioned.

Covenant not to let adjoining house for similar trade. — A covenant by a landlord of an eating-house not to let any house in the same street as the demised premises "for the purpose of carrying on the business of an eating-house" will not be construed to oblige the landlord to enforce a covenant by the lessee of an adjoining house not to carry on any business without the consent of the lessor, unless it be shown that the adjoining house was let with the intention of allowing the prohibited business to be carried on (*g*).

Permission of sale by auction. — A lease of a house in a town not unfrequently contains a covenant that the

(*g*) Kemp *v.* Bird, L. R., 5 Ch. D. 974; 46 L. J., Ch. 828; 37 L. T. 53; 25 W. R. 838 (C. A.).

lessee will not permit a sale by auction therein without the * consent of the lessor. Such a covenant was held broken where the lessee gave a bill of sale on his goods, with power to the grantee to sell by auction in default of payment, although the lessee had mortgaged the house by a sublease, and executed a general assignment for the benefit of his creditors (*h*). A covenant to use a house as a private house only is not broken by a sale by auction of the furniture (*i*).

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Sect. 5. — *Dealing with Particular Persons.*

Contracts to deal with lessor only. — Covenants or undertakings entered into by the lessee to deal with the lessor alone in the way of trade, or indeed any other mode of binding a party to purchase articles of particular individuals, are not favoured by the courts. The question upon the validity of such covenants has generally arisen with respect to leases granted by brewers to publicans, to enforce which it must be proved that *good* beer — "good marketable beer" (*k*), and perhaps also such beer as the publican requires (*l*) — was supplied (*m*); and the quality cannot be shown to be good by evidence that the brewer served good beer to his other customers at the same period of time (*m*). It is, however, now clearly settled that such covenants, which are extremely common, are legal and binding in equity on an assignee, whether they run with the land or not, provided he have actual or constructive notice of them (*n*).

A covenant to buy of the lessor only is satisfied by buying through an agent of the lessee although the lessor

(*h*) Toleman *v.* Portbury, L. R., 7 Q. B. 344; 41 L. J., Q. B. 98; 26 L. T. 292; 20 W. R. 441 (Ex. Ch.). A private house where a sale by auction takes place has been held a "place of public resort" within the Vagrant Act, 5 Geo. 4, c. 83, s. 4; Sewell, app. *v.* Taylor, resp., 7 C. B., N. S. 160.

(*i*) Reeves *v.* Cattell, 24 W. R. 485.

(*k*) Luker *v.* Dennis, L. R., 7 Ch. D. 227; 47 L. J., Ch. 174; 37 L. T. 827; 26 W. R. 167, *per* Fry, J.

(*l*) Edwick *v.* Hawkes, *infra*.

(*m*) Holcombe *v.* Hewson, 2 Camp. 391; Cooper *v.* Twibill, 3 Camp. 286, n.; Thornton *v.* Sherratt, 8 Taunt. 529.

(*n*) Wilson *v.* Hart, L. R., 1 Ch. App. 463; Catt *v.* Tourle, L. R., 4 Ch. App. 654, 659; Luker *v.* Dennis, *ubi supra*.

would have refused to sell to such agent, if he had known for whom he was agent. This was held in a case where a publican employed an agent to buy of his brewer-landlord beer of a character which the brewer did not supply to publicans (*o*).

Compensation in respect of restrictive covenant. — Where a licensed public-house is taken under the Lands Clauses Consolidation Act, 1845, the brewers are entitled, by virtue of sect. 18 of that act, to compensation for the value of the premises as increased * to them by such cov- [*673] enant (*p*). But for rating purposes, the brewery on the one hand and the licensed public-house on the other, are to be valued and rated irrespective of any such covenant (*q*).

Sale of house held under restrictive covenant. — Where, in the conditions of sale of a public-house, it was described as a free public-house, and the lease contained a clause of this nature, it was held, that the purchaser was not bound to complete his purchase, and might recover back his deposit, notwithstanding the lease was read over by the auctioneer at the time of sale (*r*). Where the lessee of a public-house covenanted, for himself and his assigns, with his lessors (brewers) to take all his beer of them, *or their successors* in their said trade, and the lessors sold their trade, and the public-house, with other premises, to third persons, who removed their business to a short distance; it was held, that the trade of the lessors was determined, and that their assignee could not take advantage of the covenant, on the assignee of the lessee purchasing beer from another brewer (*s*).

Where there was a lease of limeworks, with a stipulation that the lessor should furnish, and the lessee take, coals

(*o*) Edwick *v.* Hawkes, L. R., 18 Ch. D. 199; 50 L. J., Ch. 577; 45 L. T. 168; 29 W. R. 914.

(*p*) Bourne *v.* Mayor, &c., of Liverpool, 33 L. J., Q. B. 15; 10 Jur., N. S. 125.

(*q*) Overseers of Sunderland, app., Guardians of Sunderland Union, resp., 18 C. B., N. S. 531; 34 L. J., C. P. 121.

(*r*) Jones *v.* Edney, 3 Camp. 285.

(*s*) Doe *d.* Calvert *v.* Reid, 10 B. & C. 849.

from particular collieries; it was held, that the lessee could not, on failure by the lessor to raise the full quantity of coals, resort to other collieries for the whole of his supply, but only for the deficiency (*t*).

SECT. 6. — *Re-delivery of Fixtures, Goods, Land, &c.*

Covenants to re-deliver fixtures, &c. — Where fixtures, furniture, or other goods and chattels, are leased together with houses, it is usual to attach a schedule of them to the lease, and to insert a covenant by the lessee to re-deliver them in the same condition at the end of the term. The object in doing this is to give the lessor a remedy on the covenant (with clearer evidence) for any damage sustained by their being removed or injured during the term. Where a lessee of a coal mine had covenanted at the end of the term to yield up the works and mines and all ways and roads in good repair, order and condition, so that the works might be continued and carried on by the lessor: held, that such covenant did not include wooden sleepers, or iron [*674] tram-plates fastened to such * wooden sleepers, used for the purpose of a railway or tramway from and to the mines (*x*).

Covenants to give up part of land. — Sometimes the lessor reserves the powers of taking such portions of the land demised as he may want for building or other purposes, upon giving a specified notice to the lessee, and making a proportionable abatement out of the rent (*y*). Such provisoes may be perfectly reasonable and just, and have often been recognized by the courts both of law and equity. Such a power has been extended to the whole of the land demised (*z*); where the proviso was, that the lessor might from time to time have any part of the land leased, it was held, he might

(*t*) Wight *v.* Dicksons, 1 Dow. 141.

(*x*) Duke of Beaufort *v.* Bates, 31 L. J., Ch. 481; 10 W. R. 200.

(*y*) See Forms, *post*, Appendix B., Sects. 23, 24.

(*z*) Doe *d.* Wilson *v.* Abel, 2 M. & S. 541.

require possession of the whole (*a*). In the same case it was held, as the proviso gave the lessor power to take possession, it did not operate by way of covenant merely (*a*). But in another case, where there was no such power, it was held to operate only as a covenant (*b*).

Sect. 7. — *Covenants for Quiet Enjoyment.*

(a) *Implied.*

Covenants in law for quiet enjoyment. — All covenants between a lessor and his lessee are either express covenants, or covenants in law, that is to say, implied covenants. By a covenant in law for quiet enjoyment the lessee is to enjoy his lease against the *lawful* entry, eviction or interruption of any man, but not against tortious entries, evictions or interruptions; and the reason of the law is solid and clear, because against tortious acts the lessee has proper remedy against the wrongdoers (*c*).

Contract by parol demise. — A contract for quiet enjoyment is implied by law from a parol demise (*d*), but not a contract for good title (*e*).

From the word "demise." — From the word "demise"[1] a covenant for quiet enjoyment is implied, and a covenant for good title also if a man by deed *demise* lands for years, without any express covenant for title or for quiet enjoyment, an

(*a*) Doe *d.* Gardner *v.* Kennard, 12 Q. B. 244.

(*b*) Doe *d.* Wilson *v.* Phillips, 2 Bing. 13.

(*c*) Hays *v.* Bickerstaff, Vaugh. 118; 2 Mod. 34; Lucy *v.* Leviston, Freem. 103; 3 Keb. 163; Tisdale *v.* Sir W. Essex, Hob. 34; Platt on Covenants, 313.

(*d*) Bandy *v.* Cartwright, 8 Ex. 913; Hall *v.* City of London Brewery Co., 31 L. J., Q. B. 257.

(*e*) Bandy *v.* Cartwright, *supra*.

[1] See *ante*, ch. 5, sec. 9, (*a*), note, "Quiet enjoyment"; also ch. 1, note, "Giving lease without title"; also ch. 10, sec. 6, (*a*), note, "Eviction of lessee." An eviction, actual or constructive, whether by the landlord or by a third party under paramount right, is a breach of the covenant of quiet enjoyment, and suspends the rent totally or partially. The suspension is total if the eviction (whether total or partial) is by the landlord. It is total also if the eviction by third party is total, but a partial eviction by a third party only suspends the rent (*pro tanto*).

action of covenant lies upon the word "demise," which imports or makes a covenant in law for quiet enjoyment during the *continuance of the term, without any lawful interruption or disturbance by any person or persons having any legal title or right of entry, &c. (*g*).

[*675]

8 & 9 Vict. c. 106, s. 4. — By 8 & 9 Vict. c. 106, s. 4, the word "give" or "grant" in a deed executed after the 1st October, 1845, "shall not imply any covenant in law in respect of any tenements or hereditaments, except so far as the word 'give' or the word 'grant' may, by force of any act of parliament, imply a covenant" (*as in railway acts, &c.*).

No implied covenant when an express one. — Any express covenant or promise in a lease, either for title or quiet enjoyment, however qualified or restricted, will prevent any more general covenant or promise on the same subject being implied by law, from the word "demise" or any equivalent word — the maxim being *expressum facit cessare tacitum* (*h*). Where a person held under an agreement which amounted to an actual demise, subject to the same conditions as were mentioned in the memorandum under which the lessor held the premises, and it did not appear what those conditions were, it was held, that a contract for quiet enjoyment could not be implied (*i*). By writing not under seal signed by plaintiff and defendant, plaintiff agreed to take of defendant a farm at a yearly rent, "the tenancy to commence from the 29th of September next, for a term of eight years, subject to a lease," to be drawn up by defendant: held, that there was no contract by the defendant *to give the plaintiff possession* of the farm on the day named; for that possession was to be given only on the commencement of a tenancy *under a lease for eight years*, and not under that agreement, which was void as a lease under 8 & 9 Vict. c. 106, s. 3, nor under an implied tenancy at will, or from year to year, to be created by entry, or entry and payment of rent under that agreement (*k*). But where there is an *actual demise* for one year

(*g*) Williams *v.* Burrell, 1 C. B. 429; Smith L. & T. 230 (2nd ed.).

(*h*) See *post*, 676.

(*i*) Messent *v.* Reynolds, 3 C. & B. 194.

(*k*) Drury *v.* Macnamara, 5 E. & B.

or more, the lessor impliedly contracts to give the lessee possession at the commencement of the term, and if he fails to do so, by reason of a previous tenant wrongfully holding over, the lessee may recover damages, and is not driven to bring ejectment against the previous tenant (*l*). By agreeing to grant a lease, the intended lessor does not impliedly engage for a general warranty, nor undertake to deliver an abstract of his title (*m*); nor that he has a good title to the fee simple, and will deliver a written abstract (*n*); but he does impliedly promise that he has title to grant such a lease (*o*).

* **Cessor of implied covenant.** — A covenant in law, [*676] i.e. an implied covenant, ceases with the estate of the lessor, and does not necessarily continue during the whole term expressed to be granted. Therefore, if a tenant for life demise by indenture for fifteen years, without any express covenant for quiet enjoyment, upon his death during the term the covenant in law implied from the word "demise" (*p*) will cease, although an express covenant would continue in force to the end of the term expressed to be granted (*q*). Where tenant for life, with remainder over, demised by indenture for years, without any express covenant for quiet enjoyment, and the lessee was evicted by the remainderman after the death of the tenant for life, but before the expiration of the term: it was held, that he could not maintain an action of covenant against the executor of the tenant for life (*r*). If the incumbent of a living let lands belonging to the benefice for a term of years, his resignation of the living during the term is a breach of the contract (*s*). Where an agreement for letting part of a house at a rent of 30*l*., contained a clause that the tenant should be liable only to the said rent; such clause was held to be a

612; Brashier *v.* Jackson, 6 M. & W. 549; 8 Dowl. 784.

(*l*) Coe *v.* Clay, 5 Bing. 440; Jinks *v.* Edwards, 11 Exch. 775; Ludwell *v.* Newman, 6 T. R. 458.

(*m*) Gwillim *v.* Stone, 3 Taunt. 433.

(*n*) Temple *v.* Brown, 6 Taunt. 60.

(*o*) Stranks *v.* St. John, L. R., 2 C. P. 376; 36 L. J., C. P. 118; Anthony *v.* Brecon Market Co., L. R., 2 Ex. 167.

(*p*) See *ante*, 674.

(*q*) Evans *v.* Vaughan, 4 B. & C. 261 (2nd point).

(*r*) Adams *v.* Gibney, 6 Bing. 656; Woodhouse *v.* Jenkins, 9 Bing. 431.

(*s*) Price *v.* Williams, 1 M. & W. 6.

clause of indemnity, and that an action would lie upon it where the tenant's goods were seized under a distress for rent by the original landlord, though the party giving the indemnity was not the immediate tenant of such original landlord; it was also held, that if no notice be given to the party indemnifying, and he pay the rent, and protect his tenant's goods, such tenant cannot recover specially on a count framed on the indemnity, though he may recover the money on the common counts (*t*). In these cases of implied contract of indemnity against the consequences of distress, an action of tort is the proper form of remedy (*u*).

(b) *Express Covenant for Quiet Enjoyment.*

Express covenant usually less than implied one. — It is material to observe that the express covenant for quiet enjoyment is usually a qualified one only, and is a less protection to the lessee than the implied one, inasmuch as it does not protect the lessee in case of an eviction by title paramount to that of the lessor, as we have seen that the implied covenant does. The usual *qualified* covenant for quiet enjoyment is to the following effect, viz.: "And the said [lessor] doth hereby for himself, his heirs, executors and administrators, covenant with the said [lessee], his executors, administrators and assigns, that he and they paying the rent hereby reserved, and performing the covenants [*677] hereinbefore on his and their part * contained, shall and may peaceably possess and enjoy the said demised premises for the term hereby granted, without any interruption or disturbance from or by the said [lessor], his [heirs *or* executors, administrators] or assigns, *or any other person or persons claiming by, from or under him, them or any of them*" (*x*). Such a covenant may be safely entered into by any lessor who never had any title whatever to the demised premises, or any part thereof; because any subsequent entry, eviction, ejectment, or other interruption or disturb-

(*t*) Evans *v.* Curtis, 2 C. & P. 296.
(*u*) Hancock *v.* Caffyn, 8 Bing. 358.
(*x*) 8 & 9 Vict. c. 124, Sched. Form. 12, *post*, Appendix A., Sect. 1; see also Forms, *post*, Appendix B., Sects. 12 and 14.

ance by the real owner, or by the party entitled to possession, or by any other person who does not claim "by, from or under" the lessor, would be no breach of such qualified covenant (*y*), which covenant excludes the implied covenant for title, as well as the implied covenant for quiet enjoyment (*z*). The wrongful acts of a tenant of the lessor, under a previous lease, who does things not authorized by such lease, do not amount to a breach of the usual qualified covenant for quiet enjoyment (*a*). So in conveyances containing the usual qualified covenants for title, &c. (*b*).

Distress for land tax. — Even a distress for previous arrears of land tax due from the lessor would be no breach of the usual qualified covenant, because the collector does not claim by, from or under, but *against* the lessor (*c*).

Distress or re-entry for non-payment of ground rent. — It has not been expressly decided whether a re-entry by the ground landlord for non-payment of ground rent, whether to distrain for it, or to forfeit the lease, is a breach; but it is conceived that in either case no breach would be committed on the part of the mesne landlord; — this is a case which is usually provided for by covenant of the mesne landlord *with the subtenant* to pay the ground rent.

Lessee is put upon inquiry as to title, &c. — A lessee is a purchaser *pro tanto*, to whom the maxim *caveat emptor* applies (*d*) if he does not take advantage of his fair opportunities (*e*). Therefore, he must, at his peril, ascertain that the intended lessor has sufficient title to demise for the proposed term (*f*), and that his conveyance does not restrict him from permitting the premises to be used for any trade or business intended (*g*): or the lessee should (if possible)

(*y*) Line *v.* Stephenson, 7 Scott, 69, Ex. Ch.; Merrill *v.* Frame, 4 Taunt. 329; Smith L. & T. 290 (2nd ed.); 2 Platt on Leases, 285.

(*z*) Line *v.* Stephenson, *ubi supra*.

(*a*) Jeffryes *v.* Evans, 19 C. B., N. S. 246; 34 L. J., Q. B. 261.

(*b*) Thackeray *v.* Wood, 5 B. & S. 325; 34 L. J., Q. B. 226.

(*c*) Stanley *v.* Hayes, 3 Q. B. 105.

(*d*) Besley *v.* Besley, L. R., 9 Ch. D. 103; 38 L. T. 844; 27 W. R. 184.

(*e*) Id.; Hyde *v.* Warden, 3 Ex. D. 72; 47 L. J., Ex. D. 191—C. A.

(*f*) Spencer *v.* Marriott, 1 B. & C. 457.

(*g*) See Parker *v.* Whyte, 1 H. & M. 167; 32 L. J., Ch. 520; Jay *v.* Richardson, 30 Beav. 563; Clements *v.* Welles, L. R., J., 1 Eq. 200; 35 Beav.

obtain from the lessor an *unqualified* covenant for quiet enjoyment during the term, without any interruption or disturbance by the lessor, "*or by any other person or* [*678] *persons * whomsoever;*" i.e. against all persons having lawful title: or he must take his chance and run all risk as to the lessor's title. Where the lessee is to build upon or otherwise improve the demised premises, or pays a premium for the lease, he should take care either to investigate the lessor's title (or at all events to see the conveyance to him); or he should obtain an *unqualified* covenant for quiet enjoyment during the term (*h*). The lessor ought not to refuse to enter into such a covenant where no investigation of his title takes place. It is much more reasonable that he, rather than the tenant, should run any risk as to his own title, when he does not allow it to be investigated by or on behalf of the tenant. But it too often happens that an intended lessee fears to lose the proposed lease by asking either for an investigation of the lessor's title or for an unqualified covenant for quiet enjoyment; indeed, he generally knows that nothing of the sort would be agreed to (*i*). And yet a sublessee, who neglects to inquire into the provisions of the original lease, does so at his own risk, and may, at the instance of the original lessor, be restrained by injunction from breaking the covenants in such lease, although they are not repeated in the sublease (*k*): or he may be ejected for a forfeiture and perhaps have no remedy over against his own lessor (*l*). A tenant from year to year, equally with a tenant having a larger interest, is bound to make proper inquiries into his landlord's title, and he is affected with the consequences of not doing so (*m*).

513; Mitchell *v.* Steward, L. R., 1 Eq. 541; Wilson *v.* Hart, L. R., 1 Ch. Ap. 463; Dennett *v.* Atherton, L. R. 7 Q. B. 316, and 682, *post*.

(*h*) See Onions *v.* Cohen, 2 H. & M. 354; 34 L. J., Ch. 338, for an instance in which an unqualified covenant was stipulated for and decreed.

(*i*) And see the Vendor and Purchaser Act, 1874, *ante*, 228.

(*k*) Herbert *v.* Maclean, 12 Ir. Ch. R. 84; Robson *v.* Flight, 34 L. J., Ch. 101; 11 Jur., N. S. 147; Mitchell *v.* Steward, L. R., 1 Eq. 541.

(*l*) Spencer *v.* Marriott, 1 B. & C. 457; Hayward *v.* Parke, 16 C. B. 295, 357.

(*m*) Wilson *v.* Hart, L. R., 1 Ch. 463; 12 Jur., N. S. 460; 14 L. T. 499.

Payment of rent, &c., no condition precedent to performance of covenant. — In the covenant for quiet enjoyment by the lessee, the usual qualification "*he paying the rent thereby reserved and performing the covenants*" does not make the payment of rent, &c., a condition precedent to the performance of the covenant by the lessor. So it was laid down more than 200 years ago in Hays *v.* Bickerstaff (*n*), and recently in Edge *v.* Boileau (*n*).

The words "during the said term" mean during the whole term expressed to be granted, and not merely during the actual continuance of the term (*o*), although it is otherwise where the covenant is implied by law (*p*). A tenant for life, with a power of leasing, made a lease for years, in which was a clause that he, for himself, his heirs and *assigns, the said demised premises unto the said [*679] lessee, his executors, administrators and assigns, under the rent, covenants, conditions, exceptions and agreements before expressed, against all persons whatsoever lawfully claiming the same shall and will during the said term warrant and defend:" held, that this amounted to an express covenant for quiet enjoyment during the whole term expressed to be granted (*q*).

Covenant does not extend to acts of third persons having no title. — A general covenant for quiet enjoyment without any interruption or disturbance by the lessor, his heirs or assigns, "or by any other person or persons whomsoever," does not extend to the *unlawful acts of third persons having no title* (*r*). The law will never adjudge that a lessor covenants against the *wrongful* acts of strangers, except his covenant is express to that purpose; for the law itself does defend every

(*n*) Hays *v.* Bickerstaff, 2 Mod. 34; Vaugh. 118; Edge *v.* Boileau, 34 W. R. 103. See also Dawson *v.* Dyer, 5 B. & Ad. 584; Allen *v.* Babbington, Sid. 280. Anon. 4 Leon. 50, *contra*, would seem to be no longer law. Bastin *v.* Bidwell, L. R. 18 Ch. D. 238, and the cases seemingly *contra* there collected by Kay, J., are, it is submitted, distinguishable on the ground that the renewal of a lease is a privilege.

(*o*) Evans *v.* Vaughan, 4 B. & C. 261; Williams *v.* Burrell, 1 C. B. 402.

(*p*) *Ante*, 158.

(*q*) Williams *v.* Burrell, 1 C. B. 402; Wootton *v.* Hele, 2 Wms. Saund. 177.

(*r*) Year Bk. 22 Hen. 6, 52 b; 32 Hen. 6, 32 b; Tisdale *v.* Sir W. Essex, Hob. 34, 35; Dudley *v.* Folliott, 3 T. R. 585; Foster *v.* Pierson, 4 T. R. 687; Young *v.* Raincock, 7 C. B. 310.

man against wrong; and therefore, though one warrants land to another expressly, [or covenants for quiet enjoyment *generally*,] yet he does not defend again tortious entries (*s*). "Where a man covenants to indemnify against all persons, this is but a covenant to indemnify against lawful title. And the reason is, because, as it regards such acts as may arise from rightful claims, a man may well be supposed to covenant against all the world; but it would be an extravagant extension of such covenant, if it were good against all the acts which the folly or malice of strangers might suggest; and therefore the law has properly restrained it within its reasonable import; that is, to rightful title. It is, however, different where an individual is named, for there the covenantor is presumed to know the person against whose acts he is content to covenant, and may therefore be reasonably expected to stipulate against any disturbance from him, whether by lawful title or otherwise" (*t*). Therefore a covenant for quiet enjoyment, or for indemnity against all actions, suits, claims and demands whatsoever, both in law and equity, of certain *named persons*, extends to their unlawful acts, claims and demands, without any lawful right or title (*u*), as well as to their lawful acts (*x*).

Covenant extends to all acts of lessor. — The covenant applies to all interruptions and disturbances by the lessor himself (he being a party named) (*y*). Therefore if a lessor covenant that he will not interrupt the lessee in the enjoyment of a close demised, the erection by him of a gate on a necessary way leading to it, so as to intercept it, is a breach of the covenant, although the lessor had a legal right [*680] to erect the gate there, but for *his covenant (*z*).

So if the lessor of a mine excavates a stone quarry over it, in such a manner as thereby to interrupt the lessee in his occupation of the mine, that is a breach of the covenant for quiet enjoyment, whether the lessor has or has not

(*s*) See note (*c*), *ante*, 674.

(*t*) Nash *v.* Palmer, 5 M. & S. 374, 379; Foster *v.* Mapes, Cro. Eliz. 213.

(*u*) Fowle *v.* Welsh, 1 B. & C. 29.

(*x*) Foster *v.* Mapes, *supra*; Perry *v.* Edwards, 1 Stra. 400.

(*y*) Corus *v.* ——, Cro. Eliz. 544; Lloyd *v.* Tomkies, 1 T. R. 671.

(*z*) Andrews *v.* Paradise, 8 Mod. 318.

a legal right to excavate the quarry (*a*). If the lessor covenant with the lessee that he has not done any act to prejudice the lease, but that the lessee shall enjoy it against all persons; in this case, the words "against all persons" refer to the first branch of the covenant, and are limited and restrained to acts done by him (*b*). Where the lessors covenanted that the lessee of a mill should enjoy the mill and stream without interruption by them, or by persons claiming under them, or by their acts or procurement, a diminution of the water occasioned by supplies under contracts entered into by the lessors prior to making the lease, is not a breach of the covenant for quiet enjoyment (*c*). But where the covenants for title are general and absolute against all persons they will not be qualified by reference to other covenants, unless there are words either in the absolute covenants themselves, or in the preceding or subsequent ones, to connect them (*d*). Where A. B. covenanted with his lessee for quiet enjoyment as against any person "claiming by, from or under" him, it was held, that an eviction by a prior appointee of A. B. and C. D. was a breach of the covenant, and that the case was not altered by the grant to the lessee being "as far as in his power lay, or he lawfully might or could" (*e*). So an eviction by the lessor's widow, claiming under a settlement executed by him before the lease, constitutes a breach (*f*). So is an eviction by a tenant under a previous lease granted by the lessor (*g*). So is an injury to the foundations, committed under a previous mining lease granted by an ancestor of the lessor, expressly named in the lessor's covenant for quiet enjoyment (*h*). The usual qualified covenant for quiet enjoyment is broken by an eviction, molestation or disturbance of the lessee by persons claiming under a prior mort-

(*a*) Shaw *v.* Stenton, 2 H. & N. 858.

(*b*) Shep. Touch. 166.

(*c*) Blatchford *v.* Mayor, &c. of Plymouth, 3 Bing. N. C. 691; and see Thackeray *v.* Wood, 5 B. & S. 325; 33 L. J., Q. B. 275.

(*d*) Smith *v.* Compton, 3 B. & Adol. 189.

(*e*) Calvert *v.* Sebright, 15 Beav. 156; and see Lock *v.* Furze, 19 C. B., N. S. 96; 34 L. J., C. P. 201; 35 Id. 141; L. R., 1 C. P. 441.

(*f*) Butler *v.* Swinnerton, Cro. Jac. 656 Palm. 339; 2 Roll. 286.

(*g*) Rolph *v.* Crouch, L. R., 3 Ex. 44; 37 L. J., Ex. 8.

(*h*) Taylor *v.* Shafto, 16 L. T., N. S. 205.

gage for a long term granted by the trustees of a settlement *with the concurrence of the defendant*, who joined therein and covenanted for payment of the mortgage-money, and for title, &c. (*i*). In an action against executors in their own right on a covenant for "good title and quiet enjoyment against any person or persons whatsoever," contained [*681] in *an assignment of a lease of the testator by way of mortgage, it was held that the cause of action must arise from some act of the covenantors (*k*). In a demise for 503 years the lessor covenanted that he had not done or permitted or suffered to be done any act whereby the property was encumbered: held, that his having assented to an act which he could not prevent was not a breach of the covenant (*l*). A covenant that the lessee shall quietly enjoy against all claiming, *or pretending to claim*, a right in the premises, extends to all interruptions, be the claim legal or not, provided it appear that the disturber do not claim under the lessee himself (*m*).

Molestation by action. — A breach of the covenant for quiet enjoyment may occur either by a molestation arising from an action of any kind relating to the title or possession, or by any act by which the lessee is disturbed in the possession of the premises. Of the first sort is an ejectment by a person having a lawful title; or any other suit by which the peaceable occupation of the premises is prevented: thus, a covenant in a lease, that the lessee should quietly enjoy the estate discharged from tithes, is broken by a suit for them, although commenced after the expiration of the term (*n*): but where in covenant for quiet enjoyment the breach assigned was, "that the defendant had exhibited a bill in Chancery against him for ploughing meadow, and obtained an injunction, which had been dissolved with 20*s*. costs;" it was held on demurrer

(*i*) Carpenter *v.* Parker, 3 C. B., N. S. 206; 27 L. J., C. P. 78.

(*k*) Noble *v.* Smith, 1 H. Blac. 34.

(*l*) Hobson *v.* Middleton, 6 B. & C. 295; and see Thackeray *v.* Woods, 5 B. & S. 325; 34 L. J., Q. B. 226.

(*m*) Chaplin *v.* Southgate, 10 Mod. 384; 1 Comyn, 230; and see Ibbet *v.* De la Salle, 6 H. & N. 233; 30 L. J., Ex. 44.

(*n*) Laming *v.* Laming, Cro. Eliz. 316.

to be no breach of covenant, for the covenant was for quiet enjoyment, and this was a suit for waste (*o*).

Restriction of particular use of land. — On the other hand, any description of annoyance, on the part of the lessor himself, to the occupation of the premises, which prevents the lessee from enjoying his property in so ample a manner as he is entitled to do by the terms of the lease, amounts to a breach of the covenant for quiet enjoyment of the second sort: thus, if a man covenant that he will not interrupt the covenantee in the enjoyment of a close, the erection of a gate which intercepts it is a breach of the covenant, although he had a right to erect it (*p*). So if, after a demise of mines containing the usual covenant for quiet enjoyment, the lessor digs a quarry over the mines and makes holes, through which water percolates and escapes into the mines, although he had a legal right to work the quarry, his doing so in such a manner amounts to a breach of the covenant for quiet enjoyment of the mines (*q*). An *action on the [*682] covenant for quiet enjoyment may be maintained for the disturbance of a way of necessity (*r*); or of a way by grant from the covenantor (*s*). It must be remembered, however, that the act done must be in the assertion of title, and not a mere tortious act for which an action of trespass might be maintained (*t*). And the restriction of the particular use of the land must be the act of the lessor himself, otherwise the action cannot be supported. A decree restraining a particular use of the land by reason of a covenant with the lessor, but not otherwise interfering with the title, is not a breach of the covenant for quiet enjoyment. This was held by the Exchequer Chamber in Dennett *v.* Atherton (*u*). There the defendant covenanted with the grantor, upon a conveyance of the premises to him in fee, not to permit any part of the premises to be used for selling beer, and afterwards let part of the premises with a covenant for quiet en-

(*o*) Morgan *v.* Hunt, 2 Ventr. 215.
(*p*) Andrews *v.* Paradise, 8 Mod. 318.
(*q*) Shaw *v.* Stenton, 2 H. & N. 858.
(*r*) Morris *v.* Edgington, 3 Taunt. 24.
(*s*) Pomfret *v.* Ricroft, 1 Saund. 322.
(*t*) Sedden *v.* Senate, 13 East, 72.
(*u*) L. R., 7 Q. B. 316; 41 L. J., Q. B. 165; affirming Spencer *v.* Marriott, 1 B. & C. 457.

joyment on his part, and a covenant not to carry on particular trades (of which beer-selling was not one) on the part of the lessee. The term was assigned to the plaintiff, who had no notice of the defendant's restrictive covenant, and having used the premises as a beer-shop was restrained by an injunction in Chancery from so doing. The court decided that there was no breach of covenant, express or implied.

Notice to sub-tenant to pay rent to landlord. — A notice to a sub-tenant to pay the rent due to the landlord instead of to the tenant, appears to be a breach of the covenant if the notice be complied with (*v*), but otherwise not (*w*).

Breach under compulsion of statute. — Failure by a landlord under compulsion of a statute is no breach. Where a landlord covenanted to keep the demised premises available for storing cartridges, and for quiet enjoyment, and the Explosives Act, 1875, passed after the demise, made such storage illegal, it was held that the landlord might lawfully remove the cartridges, and committed no breach of the covenant for quiet enjoyment by so doing (*x*).

Is not to rebuild. — A covenant for quiet enjoyment does not oblige the lessor to rebuild or repair, in case the buildings are destroyed or injured by fire, tempest or otherwise (*y*).

Bursting of water-pipe. — In Anderson *v.* Oppenheimer, it was held that the covenant for quiet enjoyment was not broken by the bursting of a water-pipe conveying water from a cistern belonging to the landlord of a house let in [*683] * separate floors (*z*), but it seems that if there had been negligence on the part of the landlord in keeping and maintaining the pipe, or any act wilfully done or omitted to be done by the landlord in connection with it *after the demise*, the decision would have been the other way.

Runs with land. — The covenant for quiet enjoyment runs with the land (*a*), and is therefore binding on the assignees

(*v*) Edge *v.* Boileau, 34 W. R. 103; in this case the plaintiff recovered 100*l.* damages, and the Court refused a new trial for excess of damages.

(*w*) Edge *v.* Boileau, *supra;* Whichcot & Lindsey *v.* Nine, B. & G. 81.

(*x*) Newby *v.* Sharpe, 8 Ch. D. 39; 47 L. J., Ch. 617; 38 L. T. 583; 26 W. R. 685.

(*y*) Brown *v.* Quilter, Ambler, 620; *ante*, Chapter XVI.

(*z*) Anderson *v.* Oppenheimer, L. R., 5 Q. B. D. 602; 49 L. J., Q. B. 708, affirming decision of Field, J.

(*a*) Campbell *v.* Lewis, 3 B. & Ald.

of the reversion; and may be rendered available by the assignees of the term. Where A. let to B., who assigned to C., and C. assigned to D., and B. had covenanted for quiet enjoyment with C. and his assigns, it was held by the Exchequer Chamber, that D. might maintain an action against B., on being ejected by A., for a forfeiture by B. before the assignment to C. (*b*).

Particulars of Breaches. — When the covenant is general, the alleged breach must show an interruption or disturbance by some person having *lawful* title and right of entry (*c*). When the covenant applies to the acts of any particular person or persons *therein named*, an interruption or disturbance by any such person (whether lawful or not) amounts to a breach (*d*). Where the covenant is qualified and confined to interruptions and disturbances by the lessor, his heirs and assigns, "or by any other person or persons claiming by, from or under him, them or any of them," the breach must show an interruption or disturbance by the lessor (*e*), his heirs or assigns, or by some other person lawfully claiming by, from or under him, them or some of them (*f*). One who claims under a deed of settlement made by A. is a person claiming under A. within the meaning of the usual qualified covenant for quiet enjoyment (*g*), as also is a person who claims under a lease previously granted by the lessor (*h*), although such lease has expired (*i*). The breach must have happened during the term, and not prior to its commencement (*k*).

392, affirming Lewis *v.* Campbell, 8 Taunt. 715.

(*b*) Id.

(*c*) Lucy *v.* Leviston, Freem. 103; 3 Keb. 163; Dudley *v.* Folliott, 3 T. R. 585; Foster *v.* Pierson, 4 T. R. 617; Young *v.* Raincock, 7 C. B. 310; Hall *v.* City of London Brewery Co., 2 B. & S. 737; 31 L. J., Q. B. 257; Jeffryes *v.* Evans, 19 C. B., N. S. 246.

(*d*) Foster *v.* Mapes, Cro. Eliz. 212; Lucy *v.* Leviston, Freem. 103; 3 Keb. 163; Fowle *v.* Welsh, 1 B. & C. 29; Nash *v.* Palmer, 5 M. & S. 374.

(*e*) Corus *v.* ——, Cro. Eliz. 544; Andrews *v.* Paradise, 8 Mod. 318; Lloyd *v.* Tomkies, 1 T. R. 671; Shaw *v.* Stenton, 2 H. & N. 858.

(*f*) *Ante*, 680.

(*g*) Hurd *v.* Fletcher, 1 Doug. 43; Evans *v.* Vaughan, 4 B. & C. 261; Carpenter *v.* Parker, 3 C. B., N. S. 206; 27 L. J., C. P. 78.

(*h*) Rolph *v.* Crouch, L. R., 3 Ex. 44; 37 L. J., Ex. 8.

(*i*) Ludwell *v.* Newman, 6 T. R. 458; Coe *v.* Clay, 5 Bing. 440; Jinks *v.* Edwards, 11 Exch. 775; but see Jeffryes *v.* Evans, 19 C. B., N. S. 246; 34 L. J., C. P. 261.

(*k*) Ireland *v.* Bircham, 2 Bing. N. C. 90.

OF RIGHTS OF COMMON, WAY, LIGHTS, WATER, AND SPORTING, AND OF THE METROPOLITAN BUILDING ACTS.

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SECT. 1. — *Rights of Common (a).*[1]

(a) *Generally.*

Nature of rights of common. — Common is a right or liberty to take or use some part or portion of that which another person's lands, woods, waters, &c., naturally produce, without having any property in such lands, woods, waters, &c. (*b*). The most usual rights of common are — 1. Common of pasture — that is, a right of liberty which one or more may have to feed their cattle on another man's land. 2. Common of turbary — that is, the liberty to cut turves in another's soil to

(*a*) And see Hall on Rights of Common and Profits à Prendre, A.D. 1871.

(*b*) Bac. Abr. tit. Common; Burton Comp. 353; Tudor's L. C. Real Prop. 108 (2nd ed.).

[1] **Rights of common in America.** — "The rights of common are little known or used in this country, and probably do not exist in any of the northern or western parts of the United States which have been settled since the Revolution." 3 Kent's Com. (13th ed.) sec. 403.

These rights have, however, been recognized, and may still be created, under qualifications, by express grant, in any of the states. A right of common is an incorporeal hereditament. Leyman *v.* Abeel, 16 Johns. (N. Y.) 30.

be burnt in a house (*e*). 3. Common of estovers — that is, a right to take trees, loppings, shrubs or underwood in another's woods, coppices, &c. (*d*). Common of piscary — that is, a right to fish in another's pond, pool or river.

Right of common not mere easement. — A right of common is not a mere easement, but a *profit à prendre* in the soil of another. So is a right to hunt, shoot, fowl or fish in another's land or water, and to carry away whatever is so taken (*e*): so is a right to dig clay in another's land for the purpose of making bricks (*f*). But a right to deposit and mix dung, &c., upon adjoining land, and to make the same into manure, and carry away the same, is a mere easement and not a profit à prendre (*g*). So a right in the *occupier of an ancient messuage to water his cattle [*685] at a pond, and to take the water thereof for domestic purposes, for the more convenient use of his messuage, is a mere easement and not a profit à prendre (*h*). A right of way is a mere easement and not an interest in the land itself (*i*).

Right of common cannot exist by custom. — A right of common or other profit à prendre can exist only by grant under seal, or by prescription from time immemorial (which is always supposed to be founded on an ancient grant); or by user for thirty or sixty years pursuant to the Prescription Act (*k*), but not by custom (*l*). "The reason why a profit à prendre cannot be supported by a custom in an indefinite number of people is, that the subject of the profit à prendre would, in that case, be liable to be entirely destroyed" (*m*). A right to carry away the soil of another *without stint* can-

(*e*) Noy, 145; 3 Lev. 165; 7 East, 121.

(*d*) Cro. Jac. 25; Cro. Eliz. 820; 4 Co. R. 87 a; 5 Id. 25 a.

(*e*) Wickham *v.* Hawker, 7 M. & W. 63; Bland *v.* Lipscombe, 4 E. & B. 713, n.

(*f*) Clayton *v.* Corby, 2 Q. B. 813.

(*g*) Pye *v.* Mumford, 11 Q. B. 666, 668.

(*h*) Manning *v.* Wasdale, 5 A. & E. 758; Whaley *v.* Laing, 2 H. & N. 476; 3 H. & N. 675, 901; 27 L. J., Ex. 422.

(*i*) Godley *v.* Frith, Yelv. 159.

(*k*) 2 & 3 Will. 4, c. 71, *post*, 686.

(*l*) Gateward's case, 6 Co. R. 60; Cro. Jac. 152; Grimstead *v.* Marlow, 4 T. R. 717; Jones *v.* Robin. 10 Q. B. 581, 620.

(*m*) Race *v.* Ward, 4 E. & B. 705.

not be claimed even by prescription; nor can the claim be sustained by evidence of a lost grant (*n*).

Right of lord to demise. — The right of commoners in a common may be subservient to the right of the lord in the soil; so that the lord may dig clay pits there, or empower others to do so, without leaving sufficient herbage for the commoners, if such a right can be proved to have always been exercised by the lord (*o*). The owner of a common may, under the statute of 13 Edw. 1, st. 1 (Westm. 2), c. 46, erect thereon a house necessary for a beast-keeper or for a woodward (*p*).

Prescriptive rights at common law. — By the common law an enjoyment to confer a title to an easement or profit à prendre must have existed, (or be found by a jury to have existed,) from time immemorial [A.D. 1189], and is presumed to have originated by a grant made before that time (*q*). Any easement or profit à prendre, which is reasonable and might have been so granted, may be claimed by way of prescription at common law (*r*). Such rights made before the Prescription Act (2 & 3 Will. 4, c. 71) have been proved primâ facie by evidence of the uninterrupted exercise or enjoyment thereof, as of right, for the full period of twenty years (*s*). But now proof of the exercise or enjoyment of the right or matter claimed must be carried back at the least for such period or number of years mentioned in that act, as may be applicable to the case and to the nature of the [*686] claim (*t*). Evidence showing when the alleged * right first commenced, or when it did not exist within the time of legal memory, is sufficient to negative a prescriptive right pleaded as from time immemorial (*u*); but not a right

(*n*) Att.-Gen. *v.* Mathias, 4 K. & J. 579; 27 L. J., Ch. 761; Bailey *v.* Stephens, 12 C. B., N. S. 91.

(*o*) Bateson *v.* Green, 5 T. R. 411; Place *v.* Jackson, 4 D. & R. 318; Arlett *v.* Ellis, 7 B. & C. 346; Lascelles *v.* Lord Onslow, 36 L. T. 459.

(*p*) Patrick *v.* Stubbs, 9 M. & W. 830.

(*q*) Potter *v.* North, 1 Ventr. 387; 2 Blac. Com. 265.

(*r*) Rogers *v.* Taylor, 1 H. & N. 706; 26 L. J., Ex. 203; Carlyon *v.* Lovering, 1 H. & N. 784; 26 L. J., Ex. 251.

(*s*) Campbell *v.* Wilson, 3 East, 294; Cross *v.* Lewis, 2 B. & C. 686; Williams *v.* Morland, Id. 914.

(*t*) Sect. 6, *post*.

(*u*) Mayor, &c. of Hull *v.* Horner, Cowp. 108; Bury *v.* Pope, Cro. Eliz. 118; Gale, 143 (4th ed.); 17 Q. B. 269.

pleaded according to the statute (*x*). On the other hand, a prescriptive right from time immemorial is not so easily destroyed or lost by abandonment, non-user, or otherwise (*y*), as a right by user under the statute (*z*). And therefore it is often expedient for a defendant to plead his right or claim in several ways (*a*); ex. gr. — 1. By user for [20 *or* 30] years according to the statute and the nature of the right claimed. 2. The like, by user for [40 *or* 60] years. 3. By prescription from time immemorial, according to the common law (*b*). 4. Sometimes also a lost grant is pleaded (*c*).

The Prescription Act. — By 2 & 3 Will. 4, c. 71, entitled "An Act for shortening the Time of Prescription in certain Cases," after reciting that "whereas the expression 'time immemorial, or time whereof the memory of man runneth not to the contrary,' is now by the law of England in many cases considered to include and denote the whole period of time from the reign of King Richard the First (*d*), whereby the title to matters that have been long enjoyed is sometimes defeated by showing the commencement of such enjoyment, which is in many cases productive of inconvenience and injustice;" for remedy thereof it is enacted (s. 1), "that no claim which may be lawfully made at the common law by custom (*e*), prescription or grant to any *right of common or other profit or benefit* to be taken and enjoyed from or upon

(*x*) Clay *v.* Thackrah, 9 C. & P. 47; Clay *v.* Shackeray, 2 Moo. & R. 244; Penwarden *v.* Ching, Moo. & M. 400.

(*y*) Co. Lit. 114 b; Ward *v.* Ward, 7 Exch. 838; 21 L. J., Ex. 334; Crossley *v.* Lightowler, L. R., 3 Eq. 279; 2 Ch. App. 478; Tapling *v.* Jones, 11 H. L. Cas. 290; 34 L. J., C. P. 342; Ward *v.* Robins, 15 M. & W. 237, 244.

(*z*) Lowe *v.* Carpenter, 6 Exch. 825; Battishill *v.* Reed, 18 C. B. 696; Rochdale Canal Co. *v.* Radcliffe, 18 Q. B. 303, 304.

(*a*) Tudor's L. C. Real Prop. 154 (2nd ed.); Moon *v.* Webb, 1 C. B., N. S. 673.

(*b*) Earl of Stamford and Warrington *v.* Dunbar, 13 M. & W. 822, 827; 2 D. & L. 852; Ward *v.* Ward, 7 Exch. 838; Rogers *v.* Taylor, 1 H. & N. 706; 26 L. J., Ex. 203; Papendick *v.* Bridgwater, 5 E. & B. 166; Bailey *v.* Stephens, 12 C. B., N. S. 91.

(*c*) Lovett *v.* Wilson, 3 Bing. 115; Parker *v.* Mitchell, 11 A. & E. 788; Welcome *v.* Upton, 5 M. & W. 398; 6 Id. 536; 7 Dowl. 475; Sampson *v.* Hoddinott, 1 C. B., N. S. 590; 3 Id. 596. A plea of right of common from time immemorial is not supported by proof of a grant made in 1755; Welcome *v.* Upton, *supra*.

(*d*) A.D. 1189.

(*e*) Mounsey *v.* Ismay, 3 H. & C. 486; 34 L. J., Ex. 52. No claim to a profit à prendre can be made by custom, unless in the case of a copyhold tenant against his lord; Arlett *v.* Ellis, 9 B. & C. 671; Beardsworth *v.* Torkington, 1 Q. B. 782.

any land of our sovereign lord the king, his heirs or successors, or any land being parcel of the Duchy of Lancaster, or of the Duchy of Cornwall, or of any ecclesiastical or lay person or body corporate (except such matters and things as are herein specially provided for, and except tithes, rents and services), shall, where such right, profit or benefit shall have been actually taken and enjoyed by any person claiming right thereto * without interruption for the full period of *thirty years*, be defeated or destroyed by [*687] showing *only* (*f*) that such right, profit or benefit was first taken or enjoyed at any time prior to such period of thirty years (*g*); but, nevertheless, such claim may be defeated in any other way by which the same is now liable to be defeated (*h*); and when such right, profit or benefit shall have been so taken and enjoyed as aforesaid for the full period of *sixty years*, the right thereto shall be deemed absolute and indefeasible, unless it shall appear that the same was taken and enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing."

Sect. 4. — By sect. 4, "each of the respective periods of years hereinbefore mentioned shall be deemed and taken to be the period *next before some suit or action* (*i*) wherein the claim or matter to which such period may relate shall have been or shall be brought into question; and no act or other matter shall be deemed to be an *interruption*, within the meaning of this statute, unless the same shall have been or shall be submitted to or acquiesced in *for one year* after the party interrupted shall have had or shall have notice thereof,

(*f*) Rochdale Canal Co. *v.* Radcliffe, 18 Q. B. 287; Mill *v.* New Forest Commrs., 18 C. B. 60; 25 L. J., C. P. 212; Barker *v.* Richardson, 4 B. & A. 579.

(*g*) Mayor, &c. of Hull *v.* Horner, Cowp. 108; Eaton *v.* Swansea W. W. Co., 17 Q. B. 267, 269.

(*h*) There are six modes by which prescriptive rights may be extinguished, viz., 1. By unity of possession. 2. By release. 3. By severance. 4. By the dissolution of the corporation to which they belong. 5. By enfranchisement. 6. By inclosure. Tudor's L. C. Real Prop. 122 — 126 (2nd ed.).

(*i*) Wright *v.* Williams, 1 M. & W. 77; Ward *v.* Robins, 15 M. & W. 241, 243; Cooper *v.* Hubbuck, 12 C. B., N. S. 456; 31 L. J., C. P. 323; Bennison *v.* Cartwright, 5 B. & S. 1; 33 L. J., Q. B. 137. Not "next before the said time when, &c.;" Richards *v.* Fry, 7 A. & E. 698; 3 N. & P. 67.

and of the person making or authorizing the same to be made." It is possible for an interruption not to be submitted to or acquiesced in for one year, although no action for it be brought within that period (*k*).

Sect. 6. — By sect. 6, "in the several cases mentioned in and provided for by this act, no presumption shall be allowed or made in favour or support of any claim, upon proof of the exercise or enjoyment of the right or matter claimed for any less period of time or number of years than for such period or number mentioned in this act, as may be applicable to the case and to the nature of the claim."

Sect. 7: Proviso for disabilities. — Sect. 7 provides, "that the time during which any person, otherwise capable of resisting any claim to any of the matters before mentioned, shall have been or shall be an infant, idiot, non compos mentis, feme covert or tenant for life (*l*), or during which any action or suit shall have been pending, and which shall have been diligently prosecuted until abated by the death of any party or parties thereto, shall be excluded in the computation of the periods hereinbefore mentioned; * except only in cases where the right or claim is hereby declared to be absolute and indefeasible." [*688]

Sect. 8. — Sect. 8 provides, "that when any land or water, upon, over or from which any such way or other convenient (*m*) watercourse or use of water shall have been or shall be enjoyed or derived, hath been or shall be held under or by virtue of any term of lives, or any term of years exceeding three years from the granting thereof, the time of the enjoyment of any such way or other matter as herein last before mentioned, during the continuance of such term, shall be *excluded in the computation* of the said period of *forty years* (*n*), in case the claim shall within three years next after the end or sooner determination of such term be re-

(*k*) Bennison *v.* Cartwright, *supra*.

(*l*) Pye *v.* Mumford, 11 Q. B. 667. Not a tenant for years; Palk, Bart. *v.* Shinner, 18 Q. B. 568; 22 L. J., Q. B. 27.

(*m*) The word "convenient" is written by mistake for "easement" in the Parliament Roll; Wright *v.* Williams, 1 M. & W. 77, Parke, B. But it must be taken that the word "convenient" was intended.

(*n*) But not in the computation for *twenty* years; Palk, Bart. *v.* Shinner, 18 Q. B. 568; 22 L. J., Q. B. 27.

sisted by any person entitled to any reversion expectant on the determination thereof."

Title inchoate until action commenced. — A title under this act is always inchoate until the action is commenced in which its validity is called in question, however long it may have been enjoyed (*o*). On the other hand, a right which is inchoate at the time of the interruption or disturbance may become complete and support an action for such interruption commenced immediately after the expiration of the prescribed period and before the interruption has been submitted to for a year (*p*). So a defendant's right may become complete between the time when, &c., and the commencement of the action (*q*). A title gained under this act by user for the prescribed period may exist concurrently with a common law title, and does not merge or extinguish it (*r*). A right claimed by user under this act can only be coextensive with the user; and an issue on a plea justifying under such a right is an issue *not upon the right, but the user*, and differs therefore from an issue on a right claimed by prescription from time immemorial (*s*).

"Enjoyment as of right" means an open enjoyment. — The words "enjoyed by any person *claiming right*" (sect. 2), and "enjoyment thereof *as of right*" (sect. 5), mean an enjoyment had, not secretly or by stealth, or by tacit sufferance, or by permission asked from time to time on each occasion or on many; but an enjoyment had openly, notoriously, without particular leave at the time, by a person claiming to use without danger of being treated as a trespasser, as a matter of right, whether the right so claimed shall [*689] be strictly *legal as by prescription and adverse user, or by deed, or shall have been merely lawful so far as

(*o*) Wright *v.* Williams, 1 M. & W. 77; Richards *v.* Fry, 7 A. & E. 698; 3 N. & P. 67; Ward *v.* Robins, 15 M. & W. 237, 242.

(*p*) Flight *v.* Thomas, 11 A. & E. 688; 3 P. & D. 442; 7 Dowl. 741; S. C. (in error), 8 Cl. & Fin. 231; 1 West. 671.

(*q*) Ward *v.* Robins, 15 M. & W. 237.

(*r*) Onley *v.* Gardiner, 4 M. & W. 496; Lowe *v.* Carpenter, 6 Exch. 825.

(*s*) Davies *v.* Williams, 16 Q. B. 546; Battishill *v.* Reed, 18 C. B. 696, 703; Rochdale Canal Co. *v.* Radcliffe, 18 Q. B. 303, 304.

to excuse trespass (*t*). The user must not be precarious (*u*), but as of right against all persons, so as to be evidence of a perfect right (*x*). The enjoyment must be continuous and as of right for the prescribed period next before the commencement of the suit, of the easement *as an easement* (*y*), without interruption acquiesced in for a year (*z*): and such right is defeated by unity of possession during all or part of the period of enjoyment, though such unity of possession has its inception after the completion of the prescribed period (*a*). Therefore where the plaintiff had enjoyed a way as of right and without interruption from 1800 to 1855, when the action was brought, it was held, that his claim under the statute was defeated by unity of possession from 1843 to 1853 (*b*). The right or easement must be appurtenant to some dominant tenement, and not in gross; otherwise the act does not apply (*c*).

Remedies for a disturbance of common. — The remedies for disturbance of common may be considered as respects the lord, and as regards the commoner. The former having the right to the soil may, when wrongfully dispossessed thereof, maintain an action of ejectment (*d*); and if he be disturbed by a mere stranger, who puts in cattle, having no colour of right, or by a commoner who surcharges the common, he may maintain an action of trespass on case (*e*). In some cases, also, where the right of common is clearly stinted as to number, he may distrain the surplus number damage feasant (*f*). It has been held, that a commoner may maintain an action on the case for an injury done to the common, by taking away from thence the manure which was dropped

(*t*) Tickle *v.* Brown, 4 A. & E. 369; Gaved *v.* Martyn, 19 C. B., N. S. 732; 34 L. J., C. P. 353.

(*u*) Gaved *v.* Martyn, *supra*.

(*x*) Winship *v.* Hudspeth, 10 Exch. 5; 23 L. J., Ex. 268.

(*y*) Mounsey *v.* Ismay, 3 H. & C. 486; 34 L. J., Ex. 52. A man cannot have an "easement" over his own land, but only upon or over the land of another person. See Onley *v.* Gardiner, 4 M. & W. 496.

(*z*) See Bennison *v.* Cartwright, 5 B. & S. 1; 33 L. J., Q. B. 137.

(*a*) Onley *v.* Gardiner, 4 M. & W. 496; Battishill *v.* Reed, 11 C. B. 696; 25 L. J., C. P. 290.

(*b*) Battishill *v.* Reed, *supra*.

(*c*) Shuttleworth *v.* Le Fleming, 19 C. B., N. S. 687; 34 L. J., C. P. 309.

(*d*) Cole Ejec. 611.

(*e*) Arlett *v.* Ellis, 9 B. & C. 671.

(*f*) 1 Roll. Abr. 665; Dixon *v.* James, 2 Lutw. 1241; 4 Burr. 2431.

on it by the cattle, though his proportion of the damage be found only to the amount of a farthing; at least the smallness of the damage found is no ground for a nonsuit (*g*). One commoner, who has surcharged, may maintain an action against another for surcharging the common (*h*). One commoner cannot generally distrain the cattle of another; for the right of commonage, which every commoner has, runs through the whole land (*i*). Nor can one commoner distrain the cattle of another commoner pur cause [*690] de vicinage, inasmuch as the * cattle come upon the common under some colour of right (*k*). But in case of an absolutely stinted common, in point of number, one commoner may distrain the supernumerary cattle of another (*l*); but not if an admeasurement be necessary, as where the stint has relation to the quantity of the commoner's land (*m*). A freeman or burgess, entitled as such to common of pasture, may distrain the cattle of a person wrongfully claiming to be so entitled (*n*); or he may sue for the disturbance (*o*).

Abatement of nuisances on commons. — Where a house obstructs the exercise of a right of common the commoner may, after notice and request to the party to remove the house, pull it down, though such party is actually inhabiting and present in the house (*p*); but he may not do so without such previous notice and request (*q*). Where the injury complained of arises from an act of the lord, the commoner may often proceed himself to abate the nuisance (*r*); thus, if the lord so plant trees as to destroy the common, such an act would be considered as a nuisance, and the commoner

(*g*) Pindar *v.* Wadsworth, 2 East, 154.

(*h*) Hobson *v.* Todd, 4 T. R. 71.

(*i*) Bac. Abr. tit. Common (C. 2); Hall *v.* Harding, 4 Burr. 2426; 1 W. Blac. 673.

(*k*) Cape *v.* Scott, L. R., 9 Q. B. 269; 43 L. J., Q. B. 65; 30 L. T. 87; 22 W. R. 326.

(*l*) Year Book, 46 Edw. 3, 12 b; 2 Lutw. 1241; Mary's case, 9 Co. R. 112; Freem. 273.

(*m*) Hall *v.* Harding, 1 W. Blac. 673; 4 Burr. 2426.

(*n*) Stubbs *v.* Escourt, 2 H. & C. 47.

(*o*) Bradsworth *v.* Torkington, 1 Q. B. 782.

(*p*) Davies *v.* Williams, 16 Q. B. 546.

(*q*) Perry *v.* Fitzhowe, 8 Q. B. 757; Jones *v.* Jones, 1 H. & C. 1; 31 L. J., Ex. 506.

(*r*) Bac. Abr. tit. Common (C.).

might abate it; but he cannot justify cutting down trees planted by the lord on the waste, if it be not a total destruction of the common, though there be not a sufficiency of common left; his remedy being by action on the case (*s*). The distinction seems to be this: if the lord of the manor make a hedge round the common, or do any other act that *entirely excludes* the commoner from exercising his right, the latter may do whatever is necessary to let himself into the common: but if the commoner can get at the common, and enjoy it to a certain extent, and his right be *merely abridged* by the act of the lord, in that case his remedy is by an action on the case, and he cannot assert his right by any act of his own (*t*). The owner of a common may, under the stat. of 13 Edw. 1, stat. 1 (Westm. 2), c. 46, erect thereon a house necessary for a beast-keeper or for a woodward (*u*). It seldom, if ever, happens that a commoner can distrain the cattle of the lord as damage feasant, unless by special custom (*x*). But it seems that if cattle be *agisted* by the lord and improperly put on the common, the commoners may distrain them as the cattle of a stranger (*y*).

* **Ascertainment of rights of common.** — An action [*691] will lie against the lord by one copyholder on behalf of himself and the other copyholders, being numerous, to have their rights of common ascertained; but one copyholder, not suing on behalf of all, cannot maintain such action (*z*).

(b) *Common of Pasture.*[1]

Description and kinds of common of pasture. — Common of pasture is a right or liberty to depasture cattle, &c., on another's

(*s*) Kirby *v.* Sadgrove (in error), 1 Bos. & P. 13; 3 Anst. 892; 6 T. R. 483.

(*t*) Bac. Abr. tit. Common (C.); Cooper *v.* Marshall, 2 Wils. 51; 1 Burr. 259; Sadgrove *v.* Kirby, 6 T. R. 483; Kirby *v.* Sadgrove (in error), 1 Bos. & P. 13.

(*u*) Patrick *v.* Stubbs, 9 M. & W. 830.

(*x*) Hodesdon *v.* Gresil, Yelv. 104; Kenrick *v.* Pargiter, Cro. Jac. 208; Yelv. 129; Hoskins *v.* Robins, 2 Saund. 324; Bullen, 228, 229.

(*y*) Year Book, 30 Edw. 3, 27; Bullen, 229.

(*z*) Phillipps *v.* Hudson, L. R., 2 Ch. 243; 36 L. J., Ch. 301; 15 W. R. 370.

[1] Carr *v.* Wallace, 7 Watts (Pa.) 394; Trustees of Western University *v.* Robinson, 12 S. & R. (Pa.) 29, 33; Livingston *v.* Ten Broeck, 16 Johns. (N. Y.) 14.

land. It is generally restricted to commonable cattle, i.e. such as plough and manure the land — as horses, oxen, cows and sheep — and seldom extends to swine, goats, geese and the like (*a*). It is usually stinted as to the number of cattle to be depastured, either by an express limitation of number, or by those only being allowed to depasture which are "levant and couchant" upon the land in respect of which the right of common is claimed; i.e. such cattle as the winter eatage of the land, together with the produce of it in summer, and the food obtained from the common, is capable of maintaining (*b*). A right of common of pasture for cattle levant and couchant cannot be claimed by prescription as appurtenant to a house without any curtilage or land (*c*). A right of common of pasture without stint, as annexed to an ancient messuage without land, cannot exist by law (*d*); but common of pasture may exist in respect of land to which there is no house attached (*e*). Common of pasture is sometimes limited as to the times or periods of the year during which it may be exercised. But all such restrictions depend upon the terms of the grant (express or implied), or the extent of the user. Common of pasture is divided into — 1. Common appendant. 2. Common appurtenant. 3. Common in gross. 4. Common pur cause de vicinage.

Common appendant. — Common of pasture *appendant* is a common law right, and must have existed from time immemorial (*f*). It belongs of common right only to arable land, for commonable cattle: i.e. horses and oxen to plough the land, kine and sheep to compester it (*g*): which cattle must be "levant and couchant." Therefore it can only be claimed for as many cattle as are necessary to plough and manure the tenant's arable land (*h*). Or, perhaps, more accurately speaking, for such cattle as the land, or the produce thereof,

(*a*) Tudor L. C. Real Prop. 109 (2nd ed.).

(*b*) Whitelock *v.* Hutchinson, 2 Moo. & R. 205; Carr *v.* Lambert, 3 H. & C. 499; 34 L. J., Ex. 66.

(*c*) Scholes *v.* Hargreaves, 5 T. R. 46.

(*d*) Benson *v.* Chester, 8 T. R. 396.

(*e*) Ricketts *v.* Salwey, 2 B. & A. 360.

(*f*) Tudor L. C. Real Prop. 109 (2nd ed.).

(*g*) Co. Lit. 122 a; Bac. Abr. tit. Common (A. 1).

(*h*) Bennett *v.* Reeve, Willes, 227; Tyrringham's case, 4 Co. R. 36 a; Tudor L. C. Real Prop. 101–126 (2nd ed.).

will keep during the winter (*i*). * Tenants of a manor [*692] have no general common law right of common appendant on the waste (*k*).

Common appurtenant. — Common of pasture *appurtenant* is a right or liberty annexed to land, of depasturing cattle, &c., on another's land. It is not (like common appendant) confined to arable land or to commonable cattle (*l*), but it may be annexed to meadow, pasture or other land, and may extend to swine, goats, geese, &c., according to the terms of the grant or the extent of the user. It may be claimed by modern grant (*m*), or by user under the statute (*n*), or by prescription at common law (*o*). In a plea prescribing for common of pasture appurtenant to land it was, even before the Judicature Act, essential to aver that the cattle were the party's own cattle levant and couchant on his land; and if the claim were for an unlimited number, without these qualifying words, it could not be supported (*p*). But a person might claim common appurtenant for a certain number, and in such case need not aver that they were levant or couchant (*q*).

Common in gross. — Common of pasture in *gross* is a right or liberty to depasture cattle, &c., in another's land, independently of being the owner or occupier of any other land; and may be granted by deed to a man and his heirs, or for life (*r*). It is not an easement, because not annexed to any dominant tenement; and there can be no easement, properly so called, unless there be both a servient and a dominant tenement (*s*). Neither a common appendant nor a common appurtenant for cattle levant and couchant can be turned into a common in gross, because they cannot be severed from the land to which

(*i*) Benson *v.* Chester, 8 T. R. 396; Cheesman *v.* Hardham, 1 B. & A. 711; Tudor L. C. Real Prop. 110 (2nd ed.); *supra* (*o*).

(*k*) Earl of Dunraven *v.* Llewellyn, 15 Q. B. 791.

(*l*) Co. Lit. 122 a; 4 Co. R. 37; Plow. 161; 3 Petersdorff New Abr. 145; Tudor L. C. Real Prop. 111 (2nd ed.).

(*m*) Sacheverill *v.* Porter, Cro. Car. 482; Cowlam *v.* Slack, 15 East, 108; Fitz. N. B. 180, N.; Bac. Abr. tit. Common (A. 2).

(*n*) 2 & 3 Will. 4, c. 71, s. 1.

(*o*) Co. Lit. 122.

(*p*) Benson *v.* Chester, 8 T. R. 396, 401.

(*q*) Tudor L. C. Real Prop. 111 (2nd ed.).

(*r*) Co. Lit. 122 a; Fitz. N. B. 37; 4 Co. R. 30; Tudor L. C. Real Prop. 111, 112 (2nd ed.).

(*s*) Rangeley *v.* Midland R. Co., L. R., 3 Ch. Ap. 306, 310, Lord Cairns, L. J.

they appertain without extinguishment; but a common appurtenant for a certain number of beasts may, for such a grant has no reference to connection of tenure (*t*).

Common by vicinage. — Common pur cause de vicinage, or common by reason of neighbourhood, is a liberty the tenants of one lord in a town have to enjoy a common of pasture with the tenants of another lord in another town (*u*). It can only be claimed by grant, or by prescription from time immemorial, or by user for sixty or thirty years under 2 & 3 Will. 4, c. 71, but not by custom (*x*). This is not properly a [*693] right * of common, but rather an excuse for a trespass, and at most but a permissive right, which was originally allowed for the prevention of suits in neighbourhoods where a boundary could not easily be established (*y*). It exists where the tenants of two lords have used, time out of mind, to have common promiscuously in both lordships, lying together and open to one another (*z*); it is therefore necessary that these adjoining lands should both be commonable (*a*). It seems that common pur cause de vicinage may also exist between the proprietors of neighbouring lands, though there are no commons on either side (*b*); and the lord of a manor may have, in respect of the waste or common land in his own manor, a right to turn his own cattle upon the common of an adjoining manor (*c*). Every common pur cause de vicinage is a common appendant (*d*). Where one of two adjoining commons, with common of vicinage, was enclosed and fenced off by the owner of the soil, leaving open only a passage sufficient for the highway which led over the one to the other; yet as the separation was not complete so as to prevent the cattle

(*t*) Bunn *v.* Channen, 5 Taunt. 244.

(*u*) Co. Lit. 122 a; Jones *v.* Robin, 10 Q. B. 620, 632; Tudor L. C. Real Prop. 112, 113 (2nd ed.).

(*x*) Jones *v.* Robin, 10 Q. B. 587, 620; Clarke *v.* Tinker, Id. 604; Prichard *v.* Powell, Id. 589, 603; Tudor L. C. Real Prop. 113 (2nd ed.).

(*y*) Co. Lit. 122; R. 2 a; Willes, 32 Bac. Abr. tit. Common (A. 4); Tudor L. C. Real Prop. 112 (2nd ed.).

(*z*) 8 Co. R. 78.

(*a*) Heath *v.* Elliott, 4 Bing. N. C. 838.

(*b*) Jones *v.* Robin, 10 Q. B. 581, 620.

(*c*) Earl of Sefton *v.* Court, 5 B. & C. 917.

(*d*) 1 Danv. Abr. 799.

straying from one to the other by means of the highway, it was held, that the common by vicinage still continued (*e*).

Common of pasture in common fields. — There is frequently a mutual right of intercommoning between the owners of the land in open common fields: the extent of this right and the mode of exercising it varies according to the custom which has prevailed among the occupiers of such land. Where, however, there is no custom which has become binding upon the parties, the common law rule appears to be, that those persons only who are owners of land within an open common field are entitled to enjoy the right of intercommoning; and such right can be exercised at those times only when the corn is off the land, that is, after all the corn and grain have been reaped and gathered, and before any more has been sown (*f*). Where A. being possessed of a quantity of land in a common field, and having a right of common over the whole field, and B. having also a right of common over the whole field, they entered into an agreement, for their mutual advantage and convenience, not to exercise their respective rights for a certain term of years, and each party covenanted to that effect: it was held, that if, during the term, the cattle of B. came upon the land of A. he might distrain them damage feasant (*g*). There are also statutes pointing out the mode of exercising this right of common (*h*).

* (c) *Common of Turbary.* [*694]

Nature of common of turbary. — Common of turbary is a right or liberty to dig turf upon the ground of another, or in the lord's waste: this common is appendant or appurtenant to a house, but not to lands, for turves are to be burnt in the house (*i*). It may also be in gross, or may be granted expressly with other land (*k*). It does not give any right to the land, trees or mines; nor can it exclude the owner of the soil (*l*). A custom that all customary tenants of a manor

(*e*) Gullett *v.* Lopes, Bart., 13 East, 348. As to distress, see Cape *v.* Scott, L. R., 9 Q. B. 269, and 659 (*m*), *ante*.

(*f*) Cheesman *v.* Hardham, 1 B. & A. 706; Musgrave *v.* Cave, Willes, 319.

(*g*) Whiteman *v.* King, 2 H. Blac. 4.

(*h*) 29 Geo. 2, c. 36; 13 Geo. 3, c. 81.

(*i*) Tudor L. C. Real Prop. 116 (2nd ed.).

(*k*) O'Hare *v.* Fahy, 10 Ir. Com. L. Rep. 318, C. P.

(*l*) 4 Co. R. 37.

having gardens, parcels of their customary tenements respectively, have immemorially, by themselves, their tenants and occupiers, dug, taken and carried away from a waste within the manor, to be used upon their said customary tenements, for the purpose of making and repairing grass plots in the gardens, parcels of the same respectively, for the improvement thereof, such turf covered with grass, fit for the pasture of cattle, as hath been fit and proper to be so used at all times of the year, as often and in such quantity as occasion hath required, is bad in law, as being indefinite and uncertain, and destructive of the common (*m*); and so is a similar custom for taking and applying such turf for the purpose of making and repairing the banks and mounds in, of and for the hedges and fences of such customary tenements (*n*).

Rushes. — An occupier of a messuage and lands, who has common in the lord's waste, may set up a custom to cut rushes, as annexed to his rights of common.

(d) *Common of Estovers.*[1]

Nature and description of estovers. — Common of estovers is a right or liberty of taking necessary wood for the use and furniture of a house or farm, from off another's land (*o*).

"House-bote, plough-bote," &c. — This right is generally considered as being divided into three distinct species, distinguished from each other by a different application of the Saxon word "bote," which is synonymous with the French "estovers:" thus there is a house-bote, plough-bote and hay-bote. House-bote is a sufficient allowance of wood to build or repair the house, or to burn in it, which latter is sometimes called fire-bote. Plough-bote and cart-bote are wood to be

(*m*) Wilson *v.* Willes, 7 East, 121; 3 Smith, 167. As to the right of tenant in common to dig turves, see Wilkinson *v.* Haygarth, 12 Q. B. 837.

(*n*) Beam *v.* Bloom, 3 Wils. 456; 2 W. Blac. 926.

(*o*) Co. Lit. 122 a; 2 Blac. Com. 35; Tudor L. C. Real Prop. 114 (2nd ed.).

[1] **Common of estovers** was recognized in Leyman *v.* Abeel, 16 Johns. (N. Y.) 30; Van Rensselaer *v.* Radcliff, 10 Wend. 639; Livingston *v.* Ketcham, 1 Barb. 592.

A common of estovers, when it descends to heirs, is held by them jointly (Leyman *v.* Abeel, 10 Johns. 30); and severance extinguishes it (Livingston *v.* Ketchum).

employed in making and repairing all instruments of husbandry, as ploughs, carts, harrows, rakes, forks, &c. Hay-bote or hedge-bote is wood for * repairing hedges [*695] or fences, as pales, stiles, and gates to secure enclosures (*p*). These botes or estovers must be reasonable, and any tenant, except a strict tenant at will, may take them off the land demised to him without leave of the lessor, unless he be restrained by special covenant to the contrary (*q*). House-bote, hay-bote and fire-bote belong to a termor of common right, and he may take wood for the same; but if he take more than is needful he may be punished for waste (*r*), as if he cut down wood to burn, when he has sufficient dead wood. Although the tenant may cut down and take sufficient wood to repair walls, palings, fences or hedges as he found them, yet he cannot do so to make new ones (*s*). If a man have common of estovers by grant, he cannot build new houses to have common of estovers for those houses (*t*). Common of estovers cannot be appendant to land, but it must necessarily be to a house to be spent there (*u*).

(e) *Common of Piscary.*

Nature of common of piscary. — Common of piscary is a right or liberty of fishing in another man's water (*x*). It can only exist in streams which are not navigable,[1] for the sea

(*p*) Wood's Inst. 344.
(*q*) Fitz. N. B. 59, M.; Co. Lit. 41.
(*r*) Termes de Ley, 387, 396.
(*s*) Co. Lit. 53; Wood's Inst. 525; 9 Co. R. 113.
(*t*) Fitz. N. B. 180, H.; Arundel *v.* Steere, Cro. Jac. 25.
(*u*) Co. Lit. 121 b; Fitz. N. B. 180, C. b; Tudor L. C. Real Prop. 115 (2nd ed.).
(*x*) Tudor L. C. Real Prop. 114 (2nd ed.).

[1] **Rights of fishing in streams.** — Riparian owners upon banks of unnavigable (or non-tidal) streams, or above the flow of the tide, in tidal streams, have, at common law, an exclusive right of fishing in the waters. The People *v.* Platt, 17 Johns. (N. Y.) 195; Hooker *v.* Cummings, 20 Id. 90; Canal Commrs. *v.* People, 5 Wend. (N. Y.) 423, 443 (*per* Walworth, Chan.); Commonwealth *v.* Chapin, 5 Pick. (Mass.) 201.

It is held in Pennsylvania that owners on navigable streams above the tide have not the exclusive right of fishing (Shrunk *v.* Schuylkill, Nav. Co., 14 S. & R. (Pa.) 71); and undoubtedly the same doctrine would be held in some other states, where rivers, if *in fact navigable*, (though destitute of tides,) are held to be *navigable in law*. See *post*, sec. 4, notes.

and all navigable rivers are open to all the king's subjects (*y*).[1] It is a profit à prendre and not a mere easement nor an interest in land (*z*). It may be either appendant, appurtenant or in gross (*a*). It may exist by grant, or by prescription from time immemorial, or by user for thirty or sixty years under the Prescription Act (*b*), but not by custom (*c*). So a custom for all the inhabitants in a parish to use a footpath for angling with rods and lines for fish in the daytime, for recreation only, and not profit, is bad, as setting up a custom to take a profit à prendre in alieno solo (*d*). Common of piscary, to the exclusion of the owner of the soil, is contrary to law; though a person by prescription may have a separate right of fishing in such water, and the owner of the soil will be excluded (*e*); for a man may grant the water without passing the soil. If one grant a separate fishery, neither the soil nor water pass, but only a right of fishery (*f*).

[*696] *(f) *Approvement of Common.*

Lord may inclose common against tenants. — The lord of a manor or the owner of the soil and freehold, or his grantee or any person seised in fee of part of the waste (*g*), may inclose and approve part of a common against tenants having common of pasture, notwithstanding they have also some other right on the common, as a right to dig for sand, &c., if

(*y*) Warren *v.* Matthews, 6 Mod. 73; Begott *v.* Orr, 2 Bos. & P. 472.

(*z*) Herbert *v.* Daughluyn, Cro. Car. 492; Wickham *v.* Hawker, 7 M. & W. 63.

(*a*) Tudor L. C. Real Prop. 114 (2nd ed.).

(*b*) 2 & 3 Will. 4, c. 71, s. 1, *ante*, 686; Wickham *v.* Hawker, 7 M. & W. 63.

(*c*) Lloyd *v.* Jones, 8 C. B. 81, 89; 5 D. & L. 784.

(*d*) Bland *v.* Lipscombe, 4 E. & B. 713, n. (*c*).

(*e*) Co. Lit. 122 a.

(*f*) Bac. Abr. tit. Piscary.

(*g*) Glover *v.* Lane, 3 T. R. 445.

[1] **Fishing in the great American lakes and in ponds.** — It is held that owners on the banks of the great American lakes do not have the exclusive right of fishing in them. Sloan *v.* Biemiller, 34 Ohio St. 492 (Lake Michigan).

This principle undoubtedly extends to all the great lakes and even to comparatively small ponds, the beds of which in the United States are held to be public property. See *post*, sec. 4, note, "Ownership of beds of streams, ponds, &c., in America."

he leave sufficient common of pasture (*h*); and this may be done by an owner pur autre vie of the common (*k*).

Sufficiency of common must be left for commoners. — There must be a sufficiency of common left for the commoners (*l*), and the onus of proving that a sufficiency was left lies with the lord (*m*). Besides the lord, any person who is seised in fee of part of a waste within a manor may approve, leaving a sufficiency of common. The lord, however, has not an *unlimited* right to inclose parts of a common without the consent of the homage; for an unlimited custom for the lord to inclose parts of a common and grant them in severalty, without the consent of the homage, is bad, being inconsistent with the rights of the commoners (*n*): although a custom for the lord, with the consent of the homage, to grant parts of a common for building is good (*o*), even in exclusion of the commoners (*p*); but a custom for the lord to grant leases of the waste of a manor, without restriction, from time immemorial cannot be presumed, and is bad in point of law (*q*). A custom for one commoner to inclose against another is good (*r*); and such a custom does not abridge the common law right of the lord to inclose (*s*). Where a part and not the whole of a common has been inclosed, a commoner, in asserting his right of common, may throw down the whole of the hedge erected on the common; and a plaintiff in trespass cannot recover against him on a new assignment, because he had thrown down more than sufficient to admit his cattle (*t*). If there be a custom within a manor for a lord to grant parcels of the waste by copy of court roll,

(*h*) 20 Hen. 3 (Statute of Merton), c. 4; 13 Edw. 1, stat. 1 (Westm. 2), c. 46; 3 & 4 Edw. 6, c. 3; 2 Inst. 87; Strickland *v.* Fawcett, Willes, 57; Shakespeare *v.* Peppin, 6 T. R. 741; Tudor L. C. Real Prop. 119 (2nd ed.).

(*k*) Patrick *v.* Stubbs, 9 M. & W. 830.

(*l*) Arlett *v.* Ellis, 7 B. & C. 346; 9 Id. 671; Rogers *v.* Wynne, 7 D. & R. 521; Greenhow *v.* Ilsley, 1 Willes, 619; 2 Inst. 88; Lascelles *v.* Lord Onslow, 36 L. T. 459.

(*m*) Arlett *v.* Ellis, *supra*; Lake *v.* Plaxton, 10 Exch. 196.

(*n*) Arlett *v.* Ellis, *supra*.

(*o*) Folkard *v.* Hemmett, 5 T. R. 417, n.

(*p*) Boulcot *v.* Winmill, 2 Camp. 261.

(*q*) Badger *v.* Ford, 3 B. & A. 153.

(*r*) Barber *v.* Dixon, 1 Wils. 44.

(*s*) Duberly *v.* Page, 2 T. R. 392, n.

(*t*) Arlett *v.* Ellis, 7 B. & C. 346; 9 Id. 764.

the premises granted in that mode are well described as copyhold premises, although the date of the grant be modern (*u*).

Against what rights of common there may be approver. — In one case it appears to have been supposed that there can be no approver in derogation of a right of common of turbary (*x*): but that case has been misunderstood; it [*697] was lost by mispleading, and the * above point was not decided. It has since been held that the lord may inclose parcels of a waste against a right of common of turbary, if he leave a sufficiency of common for turbary, &c. (*y*). A custom for the owner of a waste to set out to the owners of certain ancient messuages portions of the waste, to be by them held in severalty for getting turves therein, and when the portions set out are cleared of turves, for the owners of the waste to inclose and approve such portions, to hold at their pleasure in severalty for ever, freed of all common of turbary and pasture, is good (*z*). The lord, however, has no right, under the Statute of Merton, to inclose and approve the waste of a manor, where the tenants of a manor have a right to dig gravel on the waste and to take estovers (*a*).

Encroachment on the waste. — If an encroachment upon the waste be suffered to remain for twelve years, it gives a title to the land to the party who has made the encroachment, who may dispose of it by will or otherwise (*b*); twelve years' adverse possession of a waste inclosed is a bar to the entry of a commoner; the lord's right of entry for a forfeiture is barred after twelve years by the Real Property Limitation Act 1874 (*c*).

If a licence be given by a commoner by parol to build a cottage on a common, which is accordingly executed, he can-

(*u*) Ld. Northwick *v.* Stanway, 3 Bos. & P. 346.

(*x*) Grant *v.* Gunner, 1 Taunt. 435.

(*y*) Arlett *v.* Ellis, 7 B. & C. 336; 9 Id. 671.

(*z*) Clarkson *v.* Woodhouse, 5 T. R. 412, n.; 3 Doug. 189; Bateson *v.* Green, 4 T. R. 411; Place *v.* Jackson, 4 D. & R. 318.

(*a*) Duberly *v.* Page, 2 T. R. 391.

(*b*) Asher *v.* Whitelock, 35 L. J., Q. B. 17; 11 Jur., N. S. 925.

(*c*) See Doe *d.* Tarrant *v.* Hellier, 3 T. R. 162; Whitton *v.* Peacock, 3 Myl. & K. 325.

not maintain an action for the encroachment, although no sufficient common remains (*d*).

For whose benefit the encroachment is made. — When a lessee encroaches on the waste during his term, and is suffered to remain in uninterrupted possession, it is now settled that it shall be considered primâ facie that the encroachment was made for the benefit of the tenant during his term, and afterwards of his lessor, (except as against third persons (*e*),) unless it appear clearly by some act done *at the time*, that the tenant intended the encroachment for his own benefit, and not to hold it as he held the farm to which it was adjacent (*f*). He is, therefore, bound to deliver up the land taken from the waste to his lessor at the end of his term, with the rest of the premises demised (*g*).

(g) *Inclosure of Common.*

Local inclosure acts. — The inclosure of commons, otherwise than by "approvement" (*h*), can only be effected by the authority of parliament; or by a special *agree- [*698] ment under seal between the lord and all the copyholders, under which the allotments will become of freehold tenure (*i*). But it is generally impracticable to procure the consent of *all* copyholders, especially where there are trustees, or persons under the disability of infancy or coverture, or having any limited estates. Local inclosure acts are very numerous, and formerly were very long and special; but in 1801 a general act was passed (41 Geo. 3, c. 109), intituled "An Act for consolidating in one Act certain Provisions usually inserted in Acts of Inclosure, and for facilitating the Mode of Proving the several Facts usually required on the passing of such Acts." This was followed by various others on the same subject (*k*). Afterwards it became an object of

(*d*) Harvey *v.* Reynolds, 1 C. & P. 141; Perry *v.* Fitzhowe, 8 Q. B. 757.

(*e*) Doe *d.* Raddeley *v.* Massey, 17 Q. B. 373; Doe *d.* Croft *v.* Tidbury, 14 C. B. 304.

(*f*) *Post*, Ch. XX.

(*g*) Bryan *d.* Child *v.* Winwood, 1 Taunt. 208; Doe *d.* Watt *v.* Morris, 2 Bing. N. C. 189; *post*, Ch. XX.

(*h*) *Ante*, subs. (f).

(*i*) Paine *v.* Ryder, 24 Beav. 151.

(*k*) 3 Chit. Stat. 722—758 (4th ed.), tit. Inclosure.

the legislature to facilitate the improvement of commons and lands held in common, the exchange of lands, and the division of intermixed lands; and for that purpose to render unnecessary a separate act of parliament on each occasion. With that view the General Inclosure Act (8 & 9 Vict. c. 118 (*l*)) was passed, which has been amended and extended from time to time by various acts (*m*). These may be described concisely in deeds, &c., as "The Acts for the Inclosure, Exchange and Improvement of Lands" (*n*).

SECT. 2. — *Right of Way.*

(a) *Private Ways.*

Tenant cannot acquire an easement against his landlord. — "Nothing is more clearly established," it has been said by Bacon, V.-C., "than that a person to whom land is demised cannot by its use and enjoyment acquire an easement in it, distinct from the use and enjoyment of such land against his landlord; and it is further clearly established law that the tenant cannot acquire any such right while a unity of possession in the subject demised and in the easement claimed subsists in the same person" (*o*).

Nature of rights of way. — A private right of way is a mere easement over the soil of another, and not an interest in the land itself (*p*). The presumption that the soil of a road *usque ad medium filum viæ* belongs to the owners of the adjoining lands applies equally to a private as to a public road (*q*). A private way may be either a footway, a [*699] horseway, or a cartway (*r*). * It is susceptible of almost infinite variety, according to the extent of the grant, express or implied, and of the user where no deed is

(*l*) Id.
(*m*) Id.
(*n*) 17 & 18 Vict. c. 97, s. 21.
(*o*) Outram *v.* Maude, L. R., 17 Ch. D. 391; 50 L. J., Ch. 783; 29 W. R. 818.
(*p*) Godley *v.* Frith, Yelv. 159; Hewlins *v.* Shippam, 5 B. & C. 221.
(*q*) Holmes *v.* Bellingham, 7 C. B., N. S. 329; 29 L. J., M. C. 132; Smith *v.* Howden, 14 C. B., N. S. 398.
(*r*) Co. Lit. 56 a, Gale, 317 (4th ed.).

produced (*s*). Thus, it may exist for agricultural purposes only (*t*); or for the carriage of coals only (*u*); or for the carriage of all articles except coals (*x*). A right of way for carts and carriages does not necessarily include a right of way for horned cattle; but the extent of the right is a question for the jury upon the evidence of user, &c. (*y*). So proof of user of a way for farming purposes does not necessarily prove a right of way for the purpose of conveying coal, the produce of a mine lying under the defendant's land (*z*). So, proof of a right of way for the purpose of carting timber will not support a plea of right of way for all carts, carriages, horses, and on foot; or even amount to proof of any one of those rights taken separately, so as to admit of the verdict being entered distributively (*a*). So a reservation in a lease of a right of way on foot and for horses, oxen, cattle and sheep, does not include a right to lead manure (*b*). Where premises are demised or conveyed "with a right of way thereto," it may be a question for the jury what is a reasonable use of such right (*c*). A. having a right of way to a close, demised the close to B. by a parol demise, not mentioning the right of way. B. being possessed of an adjoining close upon which he was erecting certain houses, used the way for carting building materials to A.'s close, for the purpose of using them upon his own adjoining land: — held, that it was properly left to the jury to say whether B.'s use of the road was a bonâ fide exercise of the right of way to A.'s close, or a mere colourable mode of getting to his own land (*d*). Where a right of way was expressed to be "through

(*s*) Gale, 316 (4th ed.).

(*t*) Reignolds *v.* Edwards, Willes, 282; Jackson *v.* Stacey, Holt N. P. C. 455; England *v.* Wall, 10 M. & W. 699.

(*u*) Iveson *v.* Moore, 3 Ld. Raym. 291; 1 Salk. 15.

(*x*) Marquis of Stafford *v.* Coyney, 7 B. & C. 257; Jackson *v.* Stacey, Holt N. P. C. 455.

(*y*) Ballard *v.* Dyson, 1 Taunt. 279; Gale, 319 (4th ed.).

(*z*) Cowling *v.* Higginson, 4 M. & W. 245; Gale, 331 (4th ed.).

(*a*) Higham *v.* Rabett, 5 Bing. N. C. 622; 7 Dowl. 653; Gale, 333 (4th ed.).

(*b*) Brunton *v.* Hall, 1 Q. B. 792; Gale, 333 (4th ed.).

(*c*) Hawkins *v.* Carbines, 27 L. J., Ex. 44.

(*d*) Skull *v.* Glenister, 16 C. B., N. S. 81; 32 L. J., C. P. 185; Williams *v.* James, L. R., 2 C. P. 577; 36 L. J., C. P. 256; and see Dare *v.* Heathcote, 25 L.J., Ex. 245; 26 Id. 164.

the gateway" of the plaintiff (which gateway led to other premises of the plaintiff), and, at the time of the lease, carts could come in to load and unload and turn round and go out again, but through alterations of the premises could not now do so without slightly trenching upon the plaintiff's premises: held, that in the reasonable use of the right of way the defendants had a right to do this, and that what was a reasonable user was for the jury (*e*).

Claim of right of way by user, or prescription. — A right of way may be claimed by user for [20 *or* 40] years, pursuant to 2 & 3 Will. 4, c. 71, s. 2 (*e*); or by prescription [*700] from time *immemorial (*f*), or by express or implied grant (lost or not lost(*g*)), and sometimes by custom (*h*). If a particular class of persons use a pathway, and the owner does not interrupt the user for some private reason not communicated to the persons using the path, a public right of way is gained by the user after a lapse of twenty years (*i*). Where the owners and occupiers of a particular close or farm have immemorially been used to cross a particular piece of land, a right of way is created by the immemorial usage which supposes an ancient grant; and in pleading such a right of way, it is not necessary to describe all the closes intervening between the two termini (*k*).

By the Prescription Act (2 & 3 Will. 4, c. 71), sect. 2, "No claim which may be lawfully made at common law, by custom, prescription or grant, to any way or other easement, or to any watercourse, or the use of any water, to be enjoyed or derived upon, over or from any land or water of our said lord the king, his heirs or successors, or being parcel of the Duchy of Lancaster or of the Duchy of Cornwall, or being the property of any ecclesiastical or lay person, or body corporate, when such way or other matter as herein last before mentioned shall have been actually enjoyed by any

(*e*) Bullen & L. Pl. 811 (3rd ed.).

(*f*) Id. 811; Darling *v.* Clue, 4 F. & F. 329.

(*g*) Id. 812.

(*h*) Grimstead *v.* Marlowe, 4 T. R. 718; Crabb. Real Prop. sects. 363, 372.

(*i*) Reg. *v.* Broke, 1 F. & F. 514.

(*k*) Simpson *v.* Lewthwaite, 3 B. & Adol. 226; Rouse *v.* Bardin, 1 H. Blac. 351; Jackson *v.* Shillito, 1 East, 381.

person claiming right thereto without interruption for the full period of *twenty years*, shall be defeated or destroyed by showing only that such way or other matter was first enjoyed at any time prior to such period of twenty years; but nevertheless such claim may be defeated in any other way by which the same is now liable to be defeated; and where such way or other matter as hereinbefore last mentioned shall have been so enjoyed as aforesaid for the full period of *forty years*, the right thereto shall be deemed absolute and indefeasible, unless it shall appear that the same was enjoyed by some consent or agreement expressly given or made for that purpose by deed or writing."

"Enjoyment" under act means continuous enjoyment as of right. — The enjoyment of a way or other easement under this act means *a continuous enjoyment as of right*, for twenty (*or* forty) years next before the commencement of the suit, or of some other suit or action wherein the right was brought into question (*l*); *as an easement*, without interruption acquiesced in for a year; and such right is defeated by unity of possession during all or part of the period of enjoyment, though such unity of possession has its inception after the completion of the twenty (*or* forty) years (*m*).

Therefore where * the plaintiff had enjoyed a way as [*701] of right, and without interruption from 1800 to 1855, when the action was brought: held, that his claim under the statute was defeated by unity of possession from 1843 to 1853 (*n*). Evidence that during the alleged enjoyment the land over which, and the land in right of which, it has been exercised, were held by the same person, disproves the enjoyment "as of right" and "as an easement" (*o*).

Private ways by grant. — A right of way *appurtenant* to land [1]

(*l*) Cooper *v.* Hubbuck, 12 C. B., N. S. 456; 31 L. J., C. P. 323; Beytagh *v.* Cassidy, 16 W. R. 403, Ir. Exch.

(*m*) Battishill *v.* Reed, 18 C. B. 696; 25 L. J., C. P. 290; Onley *v.* Gardiner, 4 M. & W. 496.

(*n*) Battishill *v.* Reed, *supra*.

(*o*) Clayton *v.* Corby, 2 Q. B. 813.

[1] **Ways appurtenant.** — A conveyance of land having a right of way appurtenant will carry such right although it be not expressly mentioned. Lansing *v.* Wiswall, 5 Den. (N. Y.) 213; Kent v. Waite, 10 Pick. (Mass.) 138. A right of way appurtenant to real estate is appurtenant to every part

passes to the tenant by a parol demise of the land, though nothing is said about it at the time of the demise (*p*). A private right of way may be grounded on a special permission; — as when the owner of lands grants to another a liberty of passing over his grounds, to go to church, to market, or the like, in which case the gift or grant is particular, and confined to the grantee alone: it dies with the person, and if the grantee quit the country, he cannot assign over his right to any other, nor can he justify taking another person in his company. Under a grant of a way from A. to B. "in, through and along" a particular way, the grantee is not justified in making a traverse road across the same (*q*). A reservation of a right of way "to a stable and loft over and *the space or opening under* the loft, and now used for a wood-house," does not authorize the party to use the way to a cottage built on the spot where the loft and space under was, there having been such an alteration in the substance of the place (*r*). If a right of way be granted to a cottage,

(*p*) Skull *v.* Glenister, 16 C. B., N. S. 81; 32 L. J., C. P. 185.

(*q*) Senhouse *v.* Christian, 1 T. R. 560.

(*r*) Allan *v.* Gomme, 11 A. & E. 759; explained in Henning *v.* Burnet, 8 Exch. 192, 194; Gale, 317, n. (*c*) (4th ed.).

of it. Watson *v.* Bioren, 1 S. & R. (Pa.) 227. As a general rule a way (not of necessity) established by the owner of two lots over one of them does not pass by implied grant to the grantee of the other. Warren *v.* Blake, 54 Me. 276; Fetters *v.* Humphrey, 19 N. J. Eq. 270; Stuyvesant *v.* Woodruff, 21 N. J. L. 133.

It is held, however, in *Pennsylvania*, *New Jersey* and *Louisiana* that a *permanent apparent way* established by the owner of two lots over one of them will pass as an easement upon sale of the other. Phillips *v.* Phillips, 48 Pa. St. 178; Penn. R. R. Co. *v.* Jones, 50 Id. 417; Cent. R. R. Co. *v.* Valentine, 29 N. J. L. 561 (doctrine applied to a mill-dam that benefits and burdens which plainly appear stamped upon the realty at the time of the sale pass as incident to the land); Durel *v.* Boisblanc, 1 La. An. 407.

It has been held that a permanent way which has been extinguished by unity of title will revive upon severance of the title. Kieffer *v.* Imhoff, 26 Pa. St. 438.

It has been held that a party having such a private way cannot justify going extra viam, though the way is impassable. Boyce *v.* Brown, 7 Barb. (N. Y.) 80, 89; Williams *v.* Safford, 7 Id. 309.

Private ways must be kept in repair by the owners of them. Wynkoop *v.* Burger, 12 Johns. 222; Jones *v.* Percival, 5 Pick. (Mass.) 485, 487 (*per* Morton, J.).

A grant of a right of way does not make it *necessarily* illegal for the grantor to erect a gate. Connery *v.* Brooke, 73 Pa. St. 80.

and the cottage is changed into a tan-yard, the right of way ceases; but if there is a general grant of all ways to a cottage, the right is not lost by reason of the cottage being altered (*s*).

Limited right of way. — A right of way for agricultural purposes is a limited and qualified right of way, and does not necessarily confer a right to use such a way for general and commercial purposes (*t*). So a reservation of a right of way, on foot and for horses, oxen, cattle and sheep, does not confer a right to use it to lead manure (*u*). A lease of lands, excepting the mines, with power to work them, "with free ingress, &c., to and from the same, or to or from any other mines, quarries, lands and grounds, on foot, &c., and also all necessary ways, privileges and powers whatsoever for the purposes aforesaid, and particularly of laying, making and granting waggon-ways in and over the premises demised," does not give the lessor power to grant wayleaves for all purposes, but only a limited power for getting the expected minerals (*x*). Under a grant * of a free [*702] and convenient way for the purpose of conveying coals, among other articles, the grantee has a right to lay a framed waggon-way (*y*). If a man, upon a lease for years, reserve a way to himself through the house of the lessee to a back-house, he cannot use it but at seasonable times and on request (*z*). There being two tenants of adjoining houses held under the same landlord, the tenant of one of the houses acquired a right of way to his vaults through the adjoining vaults. The landlord sold both properties at one sale, with a condition that they were to be subject to, and with the benefit, as the case might be, of all subsisting rights or easements of way or passage, so far as any lot might be affected thereby: held, that the vendor being subject to no liability as to right of way, the purchaser of one tenement could not enforce a right of way as against the other (*a*).

(*s*) *Per* Parke, B., in Henning *v.* Burnet, 8 Exch. 192.

(*t*) Jackson *v.* Stacey, Holt, 455; Reignold *v.* Edwards, Willes, 282.

(*u*) Brunton *v.* Hall, 1 Q. B. 792.

(*x*) Durham and Sunderland Rail. Co. *v.* Walker, 2 Q. B. 940.

(*y*) Senhouse *v.* Christian, 1 T. R. 560.

(*z*) Tomlin *v.* Fuller, 1 Ventr. 48.

(*a*) Daniel *v.* Anderson, 31 L. J., Ch.

Private ways of necessity. — A right of way may also arise by act and operation of law: for if a man grant a piece of ground in the middle of his field, he at the same time tacitly and impliedly gives a way to come at it (*b*); and the grantee may cross the grantor's land for that purpose without being a trespasser.[1] And it is the same though the close aliened be not totally enclosed by the grantor's land, but partly by a stranger's, for the grantee may not go over the stranger's land (*c*). The lessee of an inner close has by necessity a right of way, suitable to the business for which the lease was made, over an outer close which belongs to the same landlord: but the lessee of one close cannot as such by user acquire an easement over another close which belongs to the same landlord (*d*). When the law gives anything it gives impliedly whatsoever is necessary for enjoying the same (*e*); therefore when one (even as trustee) conveys land to another, to which there is no access but over the grantor's land, a right of way passes of necessity, as inci-

610; White *v.* Bass, 7 H. & N. 722; 31 L. J., Ex. 283; Scott *v.* Sykes, 2 F. & F. 191; Dodd *v.* Burchell, 1 H. & C. 113; Suffield *v.* Brown, 33 L. J., Ch. 249.

(*b*) Oldfield's Case, Noy, 123; 2 Roll. Abr. 60, pl. 17.

(*c*) 2 Roll. Abr. 60.

(*d*) Gayford *v.* Moffat, L. R., 4 Ch. App. 133.

(*e*) Hobart, 234.

[1] **Ways of necessity** are implied from the grant of lands to which there is no access except over other lands of the grantor or that of third parties (Simmons *v.* Sines, 4 Keys (N. Y.) 153; Smiles *v.* Hastings, 24 Barb. (N. Y.) 44; Wissler *v.* Hershey, 23 Pa. St. 333; Gardner *v.* Weaver, 11 W. N. C. (Pa.) 544; Wheeler *v.* Gilsey, 35 How. Pr. (N. Y.) 139; N. Y. Life Ins. & Tr. Co. *v.* Milnor, 1 Barb. Ch. (N. Y.) 353); or by a levy upon lands similarly situated (Pernam *v.* Wead, 2 Mass. 203); or by retaining, on sale, portions so situated (Collins *v.* Prentice, 15 Conn. 39; Brigham *v.* Smith, 4 Gray (Mass.) 297).

Ways of necessity are not implied over adjoining lands if other ways or means of access exist. M'Donald *v.* Lindall, 3 Rawle (Pa.) 492; Gayetty *v.* Bethune, 14 Mass. 49; Underwood *v.* Stuyvesant, 19 Johns. (N. Y.) 181.

They arise only from strict necessity, great convenience being not sufficient to create them. Nichols *v.* Luce, 24 Pick. (Mass.) 102, 105; Fetters *v.* Humphreys, 18 N. J. Eq. 260; 19 Id. 270; Stuyvesant *v.* Woodruff, 21 N. J. L. 133.

The right is limited to one way (Holmes *v.* Seely, 19 Wend. (N. Y.) 507, 510); and (*per* Nelson, Ch. J.) the grantor or owner of the land over which the right is claimed has a right to elect where that one way shall be.

Ways of necessity terminate when the necessity itself terminates. N. Y. Life Ins. & Tr. Co. *v.* Milnor, 3 Barb. Ch. 353.

dental to the grant (*f*); so also, if the owner of two closes, having no way to one of them but over the other, part with the latter without reserving the way, it seems that it will be reserved for him by operation of law (*g*). A lessor demised a messuage, consisting of two parts, separated by intervening reserved land, subjected only to a specific right of way for the lessee to a third building, for a specific purpose, which reservation, strictly interpreted, would preclude him from all access to the one part, which was accessible only * by crossing the reserved land in one of two [*703] directions, the one by entering it from the residue of the demised premises, the other, and far the more convenient, by entering it from the public street: it was held that the lessee was entitled to a way across the reserved land from the public street in that part (*h*). By a lease of a house, with all appurtenances, a right of way *necessary* for the convenient occupation of such house and previously enjoyed by the tenant will pass (*i*). If a way granted by a lease cannot be used by reason of its passing over the land of a third person, and there is no other way to the lessee's house, he is entitled to a way of necessity to the nearest highway by the shortest line across the grantor's land (*k*).

Way of necessity, how limited. — A way of necessity is limited by the necessity which created it, and when such necessity ceases, the right of way also ceases (*l*), but it exists after unity of possession of the close to which and the close over which it runs, and after a subsequent severance (*m*).

(*f*) Howton *v.* Frearson, 8 T. R. 50.

(*g*) Pomfret *v.* Ricroft, 1 Wms. Saund. 321, n. (6); cited L. R., 4 Ch. Ap. 135; Clarke *v.* Cogge, Cro. Jac. 170; Owen, 122; Steple *v.* Heydon, 6 Mod. 1; Chichester *v.* Lethbridge, Willes, 72, note; Howton *v.* Frearson, 8 T. R. 50.

(*h*) Morris *v.* Edgington, 3 Taunt. 24; Wilson *v.* Bagshaw, 5 Man. & R. 448; Osborn *v.* Wise, 7 C. & P. 761.

(*i*) Hinchcliffe *v.* Earl Kinnoul, 5 Bing. N. C. 1; Pheysey *v.* Vicary, 16 M. & W. 484; Kavanagh *v.* Coal Mining Co. of Ireland, 14 Ir. Com. L. R. 82, Q. B. But it is otherwise where the way is not mentioned and not absolutely necessary; Dodd *v.* Burchall, 1 H. & Colt. 113; 31 L. J., Ex. 364, and see Dyer *v.* Carter, 1 H. & N. 916; Worthington *v.* Gimson, 2 E. & E. 618; 29 L. J., Q. B. 116; Pearson *v.* Spencer, 1 B. & S. 571; 3 B. & S. 761; Polden *v.* Bastard, 4 B. & S. 258; 11 W. R. 778; 14 Id. 199.

(*k*) Osborn *v.* Wise, 7 C. & P. 761.

(*l*) Holmes *v.* Goring, and Same *v.* Elliott, 2 Bing. 76.

(*m*) Buckby *v.* Coles, 5 Taunt. 311.

Ways under leases made pursuant to Act of Parliament. — A private estate act, enabling tenants for life to grant building leases, empowered the lessors to lay out and appropriate any part of the land authorized to be leased as and for a way, street, square, passage, sewer, or other conveniences, for the general improvement of the estate, and the accommodation of the tenants and occupiers: held, that exclusive private rights of way over land so appropriated for a way might be granted to particular lessees, and that tenants under other leases granted in pursuance of the powers of the act, but containing no grant by deed of a right to use such ways, were not entitled by the provisions of the statute to use them (*n*).

SECT. 3. — *Lights.*[1]

Nature of rights to light and air. — The right to the reception of such light and air as fall *perpendicularly* on a man's

(*n*) White *v.* Leeson, 5 H. & N. 53; 29 L. J., Ex. 105.

[1] **American doctrine as to ancient lights.** — In the majority of American states, no right can be acquired by prescription to the unobstructed passage of light over an adjoining close. Pierre *v.* Fernald, 26 Me. 436; Napier *v.* Bulwinkle, 5 Rich. L. (S. C.) 311; Cherry *v.* Stein, 11 Md. 1; Hubbard *v.* Town, 33 Vt. 295; Ward *v.* Neal, 37 Ala. (N. S.) 500; Fifty Associates *v.* Tudor, 6 Gray (Mass.) 255, 259 (at least (*per* Shaw, C. J.), it can only extend in a city a reasonable distance); Rogers *v.* Sawin, 10 Id. 376; Carrig *v.* Dee, 14 Id. 583; Richardson *v.* Pond, 15 Id. 387; Parker *v.* Foote, 19 Wend. (N. Y.) 309; King *v.* Miller, 8 N. J. Eq. 559; Hayden *v.* Dutcher, 31 N. J. Eq. 217; Hazlett *v.* Powell, 30 Pa. St. 293, 296; Guest *v.* Reynolds, 68 Ill. 478; Stein *v.* Hauck, 56 Ind. 65; Klein *v.* Gehrung, 25 Tex. Supplement, 232.

The contrary or English doctrine that such right may be so acquired has been maintained by a few cases (principally overruled) and by some dicta. Gerber *v.* Grabel, 16 Ill. 217 (overruled by Guest *v.* Reynolds, 68 Id. 478); Manier *v.* Myers, 4 B. Mon. (Ky.) 514, 521 (*per* Marshall, J., *arguendo*, overruled by Ray *v.* Sweeney, 14 Bush, 1); McCready *v.* Thompson, Dudley (S. C.) 131 (overruled by Napier *v.* Bulwinkle, 5 Rich. L. (S. C.) 311); Robeson *v.* Pittenger, 1 Green Ch. (2 N. J. Eq.) 57 (overruled by King *v.* Miller, 8 N. J. Eq. 559 and by Hayden *v.* Dutcher, 31 Id. 217); Berkeley *v.* Smith, 27 Gratt. (Va.) 892, 898 (*per* Anderson, J., *arguendo*); Ray *v.* Lynes, 10 Ala. 63, 66 (impliedly stated by Ormond, J.).

It is also held in the majority of the American states that a grant by the owner of two adjoining lots of one of them does not imply the right of an unobstructed passage of light and air over the other. Keats *v.* Hugo, 115 Mass. 204; Mullen *v.* Striker, 19 Ohio St. 135; Morrison *v.* Marquardt, 24

land is a natural right of property incident to the land, and not a mere easement over the land of another: but a right to the reception of light and air, without obstruction, in a *lateral* direction over the land of another is an easement (*o*).

*By 2 & 3 Will. 4, c. 71, s. 3, "when the access [*704] and use of light to and for any dwelling-house, workshop or other building shall have been actually enjoyed therewith (*p*) for the full period of *twenty years*, without interruption, the right thereto shall be deemed absolute and

(*o*) Gale, 300 (4th ed.); Tudor L. C. Real Prop. 168 (2nd ed.).

(*p*) The words "as of right" are here purposely omitted; Flight *v.* Thomas, 11 A. & E. 695.

Iowa, 35; Rennyson's Appeal, 94 Pa. St. 147; Haverstick *v.* Sipe, 33 Id. 368; Turner *v.* Thompson, 58 Ga. 268; Powell *v.* Sims, 5 W. Va. 1; Ray *v.* Sweeney, 14 Bush (Ky.) 1; Keiper *v.* Klein, 51 Ind. 316.

Such grant does imply an unobstructed right over the adjoining close in *New Jersey*, and has been maintained elsewhere by some cases and dicta. Robeson *v.* Pittenger, 1 Green Ch. (2 N. J. Eq.) 57; Sutphen *v.* Therkelson, 38 N. J. Eq. 318; Story *v.* Odin, 12 Mass. 157; Lampman *v.* Milks, 21 N. Y. 505, 511 (*per* Selden, J.); Janes *v.* Jenkins, 34 Md. 1, 9, 10 (*per* Alvey, J.); United States *v.* Appleton, 1 Sumn. 492, 501 (*per* Story, J.).

It has been held in *New Brunswick* that where one was a lessee of two lots, and assigned one of them, he could not obstruct the passage to it of light over the other (Longmaid *v.* McNichol, 3 Allen (N. B.) 497); and likewise in New Jersey that a landlord's vendee of an adjoining lot could not obstruct the light passing over it to the windows of the leased premises (Ware *v.* Chew, 43 N. J. Eq. 493).

It has been held in New York that a landlord was not liable for obstructing his tenant's windows by building on the adjoining close. Palmer *v.* Wetmore, 2 Sand. (N. Y. Superior Ct.) 316; Myers *v.* Gemmel, 10 Barb. 537.

In several cases the judges have thought that where the owner of two lots conveyed one of them there would be an implied grant of an unobstructed passage of light, if such light was actually necessary and essential to the enjoyment of the granted premises, but not otherwise. Jackson, J., in Turner *v.* Thompson, 58 Ga. 268; Ross, P. J., in Rennyson's Appeal, 94 Pa. St. 147; Berkshire, P., in Powell *v.* Sims, 5 W. Va. 1, 7.

The refusal of the American courts to accept the English doctrine of ancient lights arises both from a hostility to the doctrine in principle and to the belief that it is a modern doctrine in England, not recognized by the King's Bench till the case of Darwin *v.* Upton, 2 Saund. 175, b, & 175, c (A.D. 1786), though previously recognized at *nisi prius*, but still not part of the common law at the settlement of this country. Several states have special statutes on the subject.

For the law in *Louisiana*, see Civil Code and Durel *v.* Boisblanc, 1 La. An. 407; Durant *v.* Riddell, 12 La. An. 746; Lavillebeuvre *v.* Cosgrove, 13 Id. 323; Cleris *v.* Tieman, 15 Id. 316.

indefeasible, any local usage or custom (*q*) to the contrary notwithstanding, unless it shall appear that the same was enjoyed by some consent or agreement expressly made or given for that purpose (*r*) by deed or writing."

Decisions. — This section puts the right on a simple foundation, and with the simplest exception (*s*). The enjoyment for the requisite period may have been partly before the passing of the act, the enactment being retrospective (*t*). The enjoyment need not be adverse (*u*). The right may be gained by user for twenty years, although by permission orally given (*x*): but not by user under a consent or agreement by deed or writing (*y*). The mere payment of rent for the use of light is not an "interruption" within the meaning of sect. 4 (*z*). An user for twenty years will create a right, though interrupted by intervals of suspension, occasioned by an unity of possession, such intervals being excluded from the computation (*a*). But where the dominant and servient tenements were for sixty years in the occupation of the same person as tenant thereof respectively; it was held, that no right to light was acquired, the enjoyment of the light during that period not being *as an easement* (*b*).

Two houses held under the same landlord. — Where two houses were held by different tenants under the same landlord for long terms granted and expiring at the same time: it was held, that by twenty years' user during such terms one tenant might acquire as against the other an indefeas-

(*q*) This destroys the custom of the city of London to build on ancient foundations to any height, notwithstanding the obstruction of ancient lights; Crofts *v.* Haldane, 8 B. & S. 194; L. R., 2 Q. B. 194; 36 L. J., Q. B. 85.

(*r*) Bridges *v.* Blanchard, 1 A. & E. 536; Blanchard *v.* Bridges, 4 A. & E. 176.

(*s*) *Per* Coleridge, J., in Merchant Taylors' Co. *v.* Truscott, 11 Exch. 863.

(*t*) Simper *v.* Foley, 2 Johns. & H. 555.

(*u*) Tickle *v.* Brown, 4 A. & E. 369.

(*x*) Mayor, &c., of London *v.* Pewterers' Co., 2 Moo. & R. 409.

(*y*) Sect. 3, *supra*.

(*z*) Plasterers' Co. *v.* Parish Clerks' Co., 8 Exch. 630; Rogers *v.* Taylor, 2 H. & N. 828, 833.

(*a*) Thomas *v.* Thomas, 2 C. M. & R. 34; Simper *v.* Foley, 2 Johns. & H. 555.

(*b*) Harbridge *v.* Warwick, 3 Exch. 552.

ible right to the light (*c*). But whether such right would continue as against the landlord or his assigns after the expiration of the terms may be doubted (*d*).

Period of user. — An user for nineteen years and a fraction gives an inchoate right, which cannot be defeated by any subsequent interruption within one *year next [*705] before the action (*e*); but in such case the full period of twenty years should be allowed to elapse before the commencement of any action for disturbance of the right; and the action must be brought before the interruption has continued for one year. Where windows were shown to have existed twenty years, it was held that proof that they did not exist twenty-two years before the obstruction was insufficient to defeat the action (*f*). When a house is partly built and the windows put in, the twenty years begin to run, notwithstanding the house is not completed or made fit for habitation until several years afterwards (*g*). Although the twenty years' user must be next before some suit or action wherein the claim to the right to light is brought in question, it need not be next before the pending suit or action (*h*).

Amount of light. — In order to establish the right to the access of an extraordinary amount of light necessary for a particular purpose or business to an ancient window, open, uninterrupted and known enjoyment of such light in the manner in which it is at present enjoyed and claimed must be shown for a period of twenty years (*i*). The owner of ancient lights is entitled, not only to sufficient light for the purposes of his then business, but to all the light which he

(*c*) Frewen *v.* Phillips, 11 C. B., N. S. 449.

(*d*) Daniel *v.* Anderson, 31 L. J., Ch. 610; White *v.* Bass, 7 H. & N. 722; 31 L. J., Ex. 283. Semble, that it would, see Simper *v.* Foley, 2 Johns. & H. 555.

(*e*) Flight *v.* Thomas, 11 A. & E. 688.

(*f*) Penwarden *v.* Ching, Moo. & M. 400.

(*g*) Courtald *v.* Legh, L. R., 4 Ex. 126.

(*h*) Cooper *v.* Hubbuck, 12 C. B., N. S. 456; 31 L. J., C. P. 323; Beytagh *v.* Cassidy, 16 W. R. 403, Ir. Exch.

(*i*) Lanfranchi *v.* Mackenzie, L. R., 4 Eq. 421; 36 L. J., Ch. 518.

had enjoyed previously to the interruption complained of (*k*). There is no distinction between the right to light and air in regard to town houses and country houses (*l*).

How lost — by alterations. — Alterations in windows by merely enlarging them, without changing their character or position, do not destroy the right to light and air through that part of the aperture which is old (*m*). Even opening new windows which cannot be obstructed without at the same time obstructing an ancient window will not justify or excuse any obstruction of such ancient window (*n*).

Dominant tenement under lease at time of severance of ownership. — It was held in Barnes *v.* Loach (*o*) — a case of the first impression — that the implication of a grant of lights upon the alienation to different persons of tenements previously in the ownership of the same person is not prevented by the fact that the dominant tenement at the time of the alienation is in lease, and consequently not in the possession of the alienor.

[*706] * **Disposition by owner of two tenements.** — In Master *v.* Hansard (*p*), the owner of an estate granted a lease of a plot of ground to A. (with a building upon it known as the Crystal Palace Hotel), who covenanted not to do anything on the demised premises which should be an annoyance to the neighbourhood or to the lessor or his tenants. Some years afterwards the same owner granted a lease to an adjoining plot to B., who entered into a similar restrictive covenant, but had no notice that such covenant was contained in A.'s lease also. Within twenty years A. commenced, by building operations, to darken the windows of B.'s house.

(*k*) Yates *v.* Jack, L. R., 1 Ch. Ap. 295; 14 L. T. 151; 14 W. R. 618.

(*l*) Martin *v.* Headen, L. R., 2 Eq. 425; 35 L. J., Ch. 682.

(*m*) Tapling *v.* Jones, 11 H. L. Cas. 290; 34 L. J., C. P. 342; Garrett *v.* Sharp, 3 A. & E. 325; Blanchard *v.* Bridges, 4 A. & E. 191, 192.

(*n*) Tapling *v.* Jones, *supra*; overruling Renshaw *v.* Bean, 18 Q. B. 112, and Hutchinson *v.* Copestake, 8 C. B., N. S. 102; 9 Id. 863; and see Binckes *v.* Pash, 11 C. B., N. S. 324, which may also be considered as overruled on this point.

(*o*) L. R., 4 Q. B. D. 494; 48 L. J., Q. B. 756; 41 L. T. 278; 28 W. R. 32.

(*p*) L. R., 4 Ch. D. 718; 48 L. J., Ch. 505; 36 L. T. 535; 25 W. R. 570, C. A. From a perusal of the judgments it does not seem that B. would have succeeded if he had had notice of A.'s covenant at the time of entering into his own.

It was held by the Court of Appeal, that B. could not prevent this being done, the restrictive covenants being for the benefit of the landlord, and not of the tenants.

Restriction of general words. — General words in a grant must be restricted to what the grantor had power to grant at the date of it. Therefore, where the defendant, having a term for four years in premises over which light came to the premises demised to plaintiff, "together with all lights," &c. for twenty-one years, bought the first-mentioned premises at the end of the four years, it was held that the defendant might destroy the light (*q*).

By non-user or abandonment. — A right to light under 2 & 3 Will. 4, c. 71, s. 3, may be lost by blocking up the windows for one year, and discontinuing to use them during that period (*r*); but a common law right to light is not so readily determined. It may be lost by twenty years' non-user (*s*). It may also sometimes be lost by an abandonment of the right for less than twenty years, provided the jury find that the party thereby manifested an intention of permanently abandoning his right to the light, or that the lights had been kept so closed as to lead the owner of the adjoining land to alter his position, in the reasonable belief that the lights had been permanently abandoned (*t*). It seems doubtful whether the manifestation of an intention to abandon the lights communicated to the owner of the adjoining land would destroy the right, until such owner altered his position, and incurred expense or loss in reliance thereon (*t*). But an abandonment is effectual when communicated *and acted on* (*u*).

* Either the tenant in possession or the reversioner [*707] may sue for an obstruction to lights (*x*).

(*q*) Booth *v.* Alcock, L. R., 8 Ch. 1663; 42 L. J., Ch. 557; 29 L. T. 231; 21 W. R. 743.

(*r*) *Ante*, Sect. 1 (a); but see Tapling *v.* Jones, 11 H. L. Cas. 290; 34 L. J., C. P. 342, in which the right given by statute after twenty years' user is considered as secure and permanent as a right at common law.

(*s*) Lawrence *v.* Obee, 3 Camp. 514; Darwin *v.* Upton, 3 T. R. 159; Cross *v.* Lewis, 2 B. & C. 686; Moore *v.* Rawson, 3 B. & C. 332; Lewis *v.* Price, 2 Wms. Saund. 175 a.

(*t*) Stokoe *v.* Singers, 8 E. & B. 31; 26 L. J., Q. B. 257.

(*u*) Reg. *v.* Chorley, 12 Q. B. 515, cited 8 E. & B. 37.

(*x*) Jeffer *v.* Gifford, 4 Burr. 2141; and see Chap. XIX., *post*.

Action by either landlord or tenant. — To prove a right under the statute there must be evidence of a continuous uninterrupted user in each year for twenty years next before action (*y*), or at all events a user commencing more than twenty years before action, and continued without interruption to within one year next before action (*z*). The issue is upon the user and not upon the right (*a*); but where a grant is pleaded the issue is upon the grant as alleged, and not upon the user or non-user during the last twenty years, which is merely matter of evidence (*b*). There must also be evidence of some sensible and material obstruction of the light and of the damage thereby occasioned to the plaintiff (*c*).

Injunction against continuance of injury. — In an action for obstructing lights, the plaintiff may claim an injunction against a continuance of the injury (*d*).

SECT. 4. — *Watercourses.*

Definition of a watercourse. — A watercourse means water flowing between banks more or less defined.[1] To constitute

(*y*) Lowe *v.* Carpenter, 6 Exch. 825.

(*z*) Flight *v.* Thomas, 8 Cl. & F. 231.

(*a*) Davies *v.* Williams, 16 Q. B. 546; Battishill *v.* Reed, 18 C. B. 698, 703.

(*b*) Ward *v.* Ward, 7 Exch. 838; 21 L. J., Ex. 334.

(*c*) Manning *v.* Gresham Hotel Co., Ir. R., 1 Ch. 115.

(*d*) See further as to injunctions, *post*, Chap. XIX.

[1] **Whether surface water may constitute a watercourse.** — (*a*) *Under ordinary circumstances.* — A stream of mere surface water, flowing through a swale or depression in the land, will not constitute a watercourse. Jones *v.* W. St. L. & P. Ry. Co., 18 Mo. App. 251; Hoyt *v.* City of Hudson, 27 Wis. 656; Benson *v.* Chicago & Alton R. R. Co., 78 Mo. 514; Luther *v.* Winnisimet Company, 9 Cush. (Mass.) 171; Ashley *v.* Wolcott, 11 Id. 192; Shields *v.* Arndt, 4 N. J. Eq. 234, 246.

(*b*) *Under exceptional circumstances.* — It has been held in some states that streams of mere surface water, draining a large tract, and having flowed in a well-defined channel worn by the action of the water on the soil from time immemorial, may constitute watercourses. Earl *v.* De Hart, 12 N. J. Eq. 280; Enrich *v.* Richter, 41 Wis. 318; Palmer *v.* Waddell, 22 Kans. 352; McClure *v.* Red Wing, 28 Minn. 186, 192 (impliedly, but not directly).

It is uncertain how widely this doctrine prevails. Of course, under such circumstances, surface water (by those decisions) has not its usual qualities, but is regulated by the same principles as other water flowing in watercourses.

a watercourse in which rights may exist, or may be acquired by user or otherwise, the flow of water must possess that unity of character by which the flow on one person's land can be identified with that on his neighbour's land. Water which squanders itself over an indefinite surface is not a watercourse, nor a proper subject-matter for the acquisition of a right by user (*e*). But the moment the water of a spring runs into a definite channel, it constitutes a watercourse (*f*). All accessions to such stream, from whatever source, form part of it (*g*). Where the question at the trial

(*e*) Briscoe *v.* Drought, 11 Ir. Com. L. R. 250; Rawstron *v.* Taylor, 11 Exch. 369; Broadbent *v.* Ramsbottom, Id. 602, 615; 25 L. J., Ex. 115.

(*f*) Dudden *v.* Guardians of Clutton Union, 1 H. & N. 627.

(*g*) Wood *v.* Waud, 3 Exch. 748.

(*c*) *The right to obstruct surface water.* — It is held by many authorities that the owner of a lot has a right to obstruct the flow of surface water from an adjoining lot upon his land, and is not liable for the damages. Morrison *v.* Bucksport & Bangor R. R. Co., 67 Me. 353; Bangor *v.* Lansil, 51 Id. 521; Swett *v.* Cutts, 50 N. H. 439; Parks *v.* Newburyport, 10 Gray (Mass.) 28; Dickinson *v.* Worcester, 7 Allen (Mass.) 19; Inhabitants of Franklin *v.* Fisk, 13 Id. 211; Flagg *v.* Worcester, 13 Gray (Mass.) 601, 607 (*per* Merrick, J.); Wagner *v.* L. I. R. R. Co., 5 Thomp. & C. (N. Y.) 163; Barkley *v.* Wilcox, 86 N. Y. 140; Gibbs *v.* Williams, 25 Kans. 214. Other authorities, following the civil law, hold that he cannot without liability. Martin *v.* Riddle, 26 Pa. St. 415; Beard *v.* Murphy, 37 Vt. 99 (*per* Poland, Ch. J., impliedly); Gillham *v.* Madison Co. R. R. Co., 49 Ill. 485; Gormley *v.* Sanford, 52 Id. 158; Ogburn *v.* Connor, 46 Cal. 346; Martin *v.* Jett, 12 La. (O. S.) 504 (*per* Bullard, J.); Lattimore *v.* Davis, 14 Id. 161 (*per* Morphy, J.).

(*d*) *The right to divert surface water.* — By many authorities it is held that the owner of land, in the exercise of due care, may obstruct the flow of surface water upon his land from other lands, even though he thereby cause it to flow upon the land of a third party to his injury, there being at common law no obligation on the part of the owner of an inferior tenement to receive the surface water of a superior tenement. Abbot *v.* K. C. & St. J. &c. Ry. Co., 83 Mo. 271; Bowlsby *v.* Speer, 31 N. J. L. 351; Schlichter *v.* Phillipy, 67 Ind. 201; Gannon *v.* Hargadon, 10 Allen (Mass.) 106. By the civil law, which is followed on this point, in some of the common law as well as the civil law states, it is the duty of the inferior tenement to receive the surface drainage of the superior tenement; but the owner of the superior tenement must use due care.

(*e*) *The right to cast surface water upon adjoining land.* — The owner of land cannot lawfully gather up and cast his surface water at one point upon the adjoining land to the injury thereof without liability for the damages, both under the common and civil laws. Hicks *v.* Silliman, 93 Ill. 255; Porter *v.* Dunham, 74 N. C. 767; Butler *v.* Peck, 16 Ohio St. 334; Livingston *v.* McDonald, 21 Iowa, 160; McCormick *v.* Kans. City &c. R. R. Co., 70 Mo. 359; Pettigrew *v.* Evansville, 25 Wis. 223; Martin *v.* Jett, 12 La. (O. S.) 504; Lattimore *v.* Davis, 14 Id. 161.

is whether there is a watercourse or not, the judge ought, before he leaves that question to the jury, to instruct them as to what constitutes a "watercourse" in law (*h*).

Nature of rights in natural streams. — Flowing water is publici juris, not in the sense that it is a bonum vacans, to which the first occupant may acquire an exclusive right, [*708] * but that it is public and common in this sense only, that *all may reasonably use it who have a right of access to it;* that none can have any property in the water itself, except in the particular portion which he may choose to abstract from the stream and take into his possession, and that during the term of his possession only (*i*). The right to the use of flowing water is clear. Primâ facie the proprietor of each bank is the proprietor of half the land covered by the stream, *ad medium filum aquæ*, but there is no property in the water.[1] Each proprietor of the land has a

(*h*) Briscoe *v.* Drought, 11 Ir. Com. L. R. 250; and see Elliott *v.* South Devon R. Co., 2 Exch. 725; Reg. *v.* Cottle, 16 Q. B. 412; Cashell *v.* Wright, 6 E. & B. 891.

(*i*) Embrey *v.* Owen, 6 Exch. 369; Mason *v.* Hill, 3 B. & Adol. 304; 5 Id. 1.

[1] **Ownership of beds of streams, ponds, &c., in America.** — *Prima facie*, at common law, proprietors upon the banks of unnavigable (or non-tidal) streams or upon navigable (tidal) streams, above the ebb and flow of the tide, own the land beneath the water to the centre of the stream. People *v.* Platt, 17 Johns. (N. Y.) 195; Hooker *v.* Cummings, 20 Id. 90; Comm'rs of Canal Fund *v.* Kempshall, 26 Wend. (N. Y.) 404; Canal Comm'rs *v.* The People, 5 Id. 423, 444 (*per* Walworth, Chan.); Commonwealth *v.* Chapin, 5 Pick. (Mass.) 199; Newton *v.* Eddy, 23 Vt. 319; Cates *v.* Wadlington, 1 M'Cord (S. C.) 580; Lunt *v.* Holland, 14 Mass. 149; Adams *v.* Pease, 2 Conn. 481; Palmer *v.* Mulligan, 3 Caines (N. Y.) 319; Ingraham *v.* Wilkinson, 4 Pick. (Mass.) 268; Inhabitants of Deerfield *v.* Arms, 17 Id. 41; King *v.* King, 7 Mass. 496; Lamb *v.* Rickets, 11 Ohio, 311 (the Tuscarawa); Benner's Lessee *v.* Platter, 6 Id. 505.

This doctrine prevails generally in the United States, but it is subject to some exceptions.

For example, in Pennsylvania riparian owners on banks of navigable streams above the tide do not own any part of the bed of the stream (Shrunk *v.* Schuylkill Nav. Co., 14 S. & R. (Pa.) 71; Carson *v.* Blazer, 2 Binn. (Pa.) 475); and there are many decisions that such owners upon banks of streams *unaffected by the tide, if in fact navigable*, do not own any part of their beds (McManus *v.* Carmichael, 3 Iowa, 1; Haight *v.* Keokuk, 4 Id. 199; Railroad Co. *v.* Schurmeir, 7 Wall. 272, 287 (the Mississippi River in Minnesota, *per* Clifford, J., *arguendo*); Barney *v.* Keokuk, 94 U. S. 324 (the Mississippi in Iowa); and see Bullock *v.* Wilson, 2 Porter (Ala.) 436. Doubtless many

right to the advantage of the stream *flowing in its natural course* over his land,[1] and to use the same as he pleases for

other cases might be cited. The following among other cases decide that the common law rule, entitling the riparian proprietor to own the soil under the water to the centre of the stream, applies to rivers, though in fact navigable, if either wholly destitute of tides or above the flow of the tide. Comm'rs of Canal Fund *v.* Kempshall, 26 Wend. (N. Y.) 404 (Genesee River); Gavitt *v.* Chambers, 3 Ohio, 496 (Sandusky River); Walker *v.* Board of Public Works, 16 Ohio, 540 (the Great Miami declared navigable by statute); Middleton *v.* Pritchard, 3 Scam. (Ill.) 510 (the Mississippi River); People *v.* St. Louis, 5 Gilm. (Ill.) 351 (Mississippi River); Ensminger *v.* The People, 47 Ill. 384 (Ohio River); City of Chicago *v.* Laflin, 49 Id. 172 (Chicago River); Braxon *v.* Bressler, 64 Ill. 488 (Rock River); Cox *v.* The State, 3 Blackf. (Ind.) 193, 198, 199 (*per* Stevens, J.); Steamboat "Magnolia" *v.* Marshall, 39 Miss. 109 (the Mississippi).

It should be said, however, that though the preponderance of authority is to the effect that a stream navigable in fact is not navigable in law unless the tide flows, yet the public have an easement over some streams destitute of tides, either by custom or statute, to navigate them with boats, logs, skips, &c., and that the riparian owners cannot obstruct them; and they may be called in a sense navigable, as they are public highways. Berry *v.* Carle, 3 Me. 269; Spring *v.* Russell, 7 Me. 273 (*per* Mellen, C. J.); Wadsworth *v.* Smith, 11 Me. 278 (*per* Parris, J.); Adams *v.* Pease, 2 Conn. 481 (*per* Swift, Ch. J.); The People *v.* Platt, 17 Johns. (N. Y.) 195, 211 (*per* Spencer, Ch. J.); Moore *v.* Sanborne, 2 Mich. 519; Cox *v.* The State, 3 Blackf. (Ind.) 193, 198, 199 (*per* Stevens, J.).

And, on the other hand, in Rowe *v.* Granite Bridge Corporation, 21 Pick. (Mass.) 344, it was held that a salt creek in which the tide did ebb and flow was not navigable.

Riparian owners on banks of navigable streams own only to high water-mark of the medium tides. Chapman *v.* Kimball, 9 Conn. 38; Mayor, &c., of Mobile *v.* Eslava, 9 Porter (Ala.) 577. The spring tides, &c., are not taken as the limits.

Lakes and ponds. — Riparian owners upon banks of lakes and natural ponds own only to low water-mark, being distinguished in this respect both from the ocean and from rivers. Sloan *v.* Biemiller, 34 Ohio St. 492 (Lake Michigan); Seaman *v.* Smith, 24 Ill. 521 (the language of this case is to the point where the water usually stands); La Plaisance Bay Harbor Co. *v.* City of Monroe, Walker's Ch. (Mich.) 155, 168; Canal Comm'rs *v.* The People, 5 Wend. (N. Y.) 423, 447 (*per* Walworth, Chan.); Champlain & St. L. R. R. Co. *v.* Valentine, 19 Barb. (N. Y.) 484, 491, 492 (low water, reason for distinction in this respect from the sea given by Hand, J.); Waterman *v.* Johnson, 13 Pick. (Mass.) 261, 265 (low water-mark, *per* Shaw, C. J.); Bradley *v.* Rice, 13 Me. 198; Wheeler *v.* Spinola, 54 N. Y. 377; Austin *v.* Rutland R. R. Co., 45 Vt. 215, 243 (low water-mark on Lake Champlain); Fletcher *v.* Phelps, 28 Vt. 257; State *v.* Franklin Falls Co., 49 N. H. 240, 250 (*per* Smith, J.); West Roxbury *v.* Stoddard, 7 Allen (Mass.) 158; State *v.* Gilmantown, 9 N. H. 461.

[1] **Riparian owners' right to use of flowing water.** — They have a right to use it for drinking purposes, for watering cattle, and for other domestic purposes. Shook *v.* Colohan, 12 Or. 239, 244; Stein *v.* Burden, 29 Ala. 127, 132. They may use a reasonable amount for irrigating purposes (Weston *v.* Alden, 8 Mass. 136; Shook *v.* Colohan, 12 Or. 239); but if they divert the

any purpose of his own, not inconsistent with a similar right in the proprietors of land above or below; so that neither can any proprietor above diminish the quantity or injure the quality of the water which would otherwise naturally descend, nor can any proprietor throw back the water without the licence or the grant of the proprietor above (*k*); or a right to do so acquired by prescription from time immemorial, or by user for [40 *or* 20] years, pursuant to 2 & 3 Will. 4, c. 71, s. 2 (*l*). Every riparian proprietor has a right to the reasonable use of water flowing past his land, namely, for his domestic purposes, and for his cattle. He has also the right to the use of the water for any other purpose, provided he does not thereby interfere with the rights of the proprietors either above or below him (*m*). Subject to this

(*k*) Mason *v.* Hill, 5 B. & A. 1, 24; Wright *v.* Howard, 1 Sim. & Stu. 190, 203; Acton *v.* Blundell (in error), 12 M. & W. 348, 349; Gale, 204 (4th ed.).

(*l*) Sampson *v.* Hoddinott, 1 C. B., N. S. 596; 3 Id. 590; 3 Id. 596; Moore *v.* Webb, 1 C. B., N. S. 673; Murgatroyd *v.* Robinson, 7 E. & B. 391; Gaved *v.* Martyn, 19 C. B., N. S. 732; 34 L. J., C. P. 353; Tudor L. C. Real Prop. 159—168 (2nd ed.).

(*m*) Miner *v.* Gilmour, 12 Moore, P. C. 131; 7 W. R. 328, cited L. R., 2 Ex. 9; Sampson *v.* Hoddinott, 1 C. B., N. S. 590; 3 Id. 596; 26 L. J., C. P. 148; Embrey *v.* Owen, 6 Exch. 353; Ld. Norbury *v.* Kitchin, 3 F. & F. 292; 9 Jur., N. S. 132.

water, they must return the surplus not used to the stream again (Anthony *v.* Lapham, 5 Pick. (Mass.) 175.

Reasonable detention. — Riparian owners may dam and reasonably detain the waters of small streams to accumulate volume. Davis *v.* Getchell, 50 Me. 602; Springfield *v.* Harris, 4 Allen (Mass.) 494; Thurber *v.* Martin, 2 Gray (Mass.) 394; Gould *v.* Boston Duck Co., 13 Id. 442; Merritt *v.* Brinkerhoff, 17 Johns. (N. Y.) 306; Hetrich *v.* Deachler, 6 Pa. St. 32.

The right to divert a stream. — An upper riparian proprietor (at common law) cannot (subject to above and to other exceptions) divert the stream to the injury of a lower proprietor (Weiss *v.* Oregon Iron &c. Co., 13 Or. 496; Colrick *v.* Swinburne, 105 N. Y. 503); and a lower proprietor may recover nominal damages for such a diversion, though he has sustained no *present* actual injury (Newhall *v.* Ireson, 8 Cush. (Mass.) 595; Stowell *v.* Lincoln, 11 Gray (Mass.) 434).

Opposite proprietors have each a right to one-half the use of the water. Pratt *v.* Lamson, 2 Allen (Mass.) 275. A proprietor cannot divert water from a mill owned by him in common with another person. Blanchard *v.* Baker, 8 Greenl. (Me.) 253. The right to divert water may, however, be acquired by prescription. Messinger's Appeal, 109 Pa. St. 285; Tyler *v.* Wilkinson, 4 Mason, 396. A riparian owner has a remedy against a mill owner who maliciously draws off water, thus destroying riparian owner's ice. Stevens *v.* Kelly, 78 Me. 445.

For *Modifications of Common Law* in the Pacific states, see Pomeroy on Riparian Rights.

condition a riparian proprietor may dam up the stream for the purpose of a mill, or divert the water for the purposes of irrigation; but he has no right to interrupt the regular flow of the stream, if he thereby interferes with the lawful use of the water by other proprietors and inflicts upon them a sensible injury (*n*). He has a right by means of water-wheels and machinery, erected by him for that purpose, to pump up water from the stream to a reservoir, and to convey it thence by pipes to his dwelling-house upon another estate at a distance from the stream, and there to apply such water to his domestic and other necessary purposes of utility; provided he takes only a reasonable quantity with reference to the size of the stream and the rights of his neighbour; but he has no right to take more water by means of the wheels and machinery than he would have a right to take otherwise (*o*). The proprietor of *a water- [*709] course has a right to avail himself of its momentum as a power which may be turned to beneficial purposes; and he may make a reasonable use of the water itself for domestic purposes, for watering cattle, or even for irrigation, provided it is not unreasonably detained or essentially diminished (*p*). A riparian proprietor has a right to divert water to a reasonable extent for the purposes of irrigation; but the extent of such user must depend upon the circumstances of each case. It must not be such as materially to prejudice any proprietor below (*q*). If a riparian proprietor unreasonably *detain* the water of a stream for purposes of irrigation, whereby another proprietor lower down the stream is deprived of the use of the water daily for several hours, until it is too late for him to use it for irrigating his land, or for any other lawful and necessary purpose, he may maintain an action (*r*). A proprietor of land contiguous to a stream may, *as soon as he is injured* by the diversion of the water from its natural course, maintain an action against the party so diverting it: and it

(*n*) Miner *v.* Gilmour and Ld. Norbury *v.* Kitchin, *supra.*

(*o*) Lord Norbury *v.* Kitchin, *supra.*

(*p*) Blanchard *v.* Baker, 8 Greenleaf, 258, cited 4 C. B., N. S. 604; 6 Exch. 365.

(*q*) Embrey *v.* Owen, 6 Exch. 353, 372; Ld. Norbury *v.* Kitchin, 3 F. & F. 292.

(*r*) Sampson *v.* Hoddinott, 1 C. B., N. S. 593, 612; 3 Id. 596; 26 L. J., C. P. 148.

is no answer to the action that the defendant first appropriated the water to his own use, unless he has had twenty years' undisturbed enjoyment of it in its altered course (*s*). So where the water is improperly heightened and penned and forced back upon the plaintiff's land situate higher up the stream (*t*). So where the stream is heated or polluted with the refuse of a mill or works higher up the stream (*u*).[1] The right to have a stream flow *in its natural state*, without diminution or alteration, is *a natural right incident to the property* in the land through which it passes, and not a mere easement (*x*). The owner of such property has a right to have the stream come to him in its natural state in flow, quantity and quality, and to go from him without obstruc-

(*s*) Mason *v.* Hill, 5 B. & A. 1; 2 N. & M. 743; 3 B. & Adol. 304; 5 Id. 1.

(*t*) Saunders *v.* Newman, 1 B. & A. 258; Gale, 220 (4th ed.).

(*u*) Wood *v.* Waud, 3 Exch. 748; Carlyon *v.* Lovering, 1 H. & N. 784; Whaley *v.* Laing, 2 H. & N. 476; 3 Id. 675; 5 Id. 480; 26 L. J., Ex. 327; 27 Id. 422; Murgatroyd *v.* Robinson, 7 E. & B. 391; Magor *v.* Chadwick, 11 A. & E. 571; Mason *v.* Hill, 3 B. & Adol. 304; 5 Id. 1.

(*x*) Embrey *v.* Owen, 6 Exch. 353, 369; Dickinson *v.* Grand Junction Canal Co., 7 Exch. 282, 299; Chasemore *v.* Richards, 2 H. & N. 163; 7 H. L. Cas. 349; 29 L. J., Ex. 81; Rawstron *v.* Taylor, 11 Exch. 381, 382; Tyler *v.* Wilkinson, 4 Mason U. S. R. 397; Gale, 201—209 (4th ed.).

[1] **Pollution of water.** — What constitutes actionable or enjoinable pollution varies under different circumstances.

The following have been so held, viz.: —

Such pollution of a stream as to render it unfit for drinking (Dwight Printing Co. *v.* Boston, 122 Mass. 583); turning sink water into a watercourse (Jackmon *v.* Arlington Mills, 137 Id. 277); escape of gas through the ground into a well (Sherman *v.* Fall River Iron Works, 5 Allen (Mass.) 213); casting edgings, shavings, débris, wood refuse and long sawdust into the Kennebec River above a cotton mill (Lockwood Co. *v.* Lawrence, 77 Me. 297, but mill owners allowed at present to cast in common sawdust); casting into the water refuse from gas works (Carhart *v.* Auburn Gaslight Co., 22 Barb. (N. Y.) 297); or tanyard refuse (Howell *v.* M'Coy, 3 Rawle (Pa.) 256).

It has been held in Pennsylvania that the owner of a coal mine might pump water therefrom into a drainage stream even though thereby rendering the water of the stream totally unfit for domestic use, the exigencies of coal mining requiring such use of streams. Penn. Coal Co. *v.* Sanderson, 113 Pa. St. 126 (Mercier, C. J., and J. J. Gordon and Trunkey dissenting).

In Brookline *v.* Mackintosh, 133 Mass. 215, it was held that the casting of animal matter in state of decomposition, and small quantities of arsenic from a wool-pulling establishment into the Charles River above and within 40,000 feet of where the town of Brookline got its water supply by percolation into a filtering gallery, was not enjoinable.

tion, upon the same principle that he is entitled to the support of his neighbour's soil for his own land in its natural state. Such a right in no way depends upon prescription, or the presumed grant of his neighbour, nor from presumed acquiescence of the proprietors above and below (*y*). By grant, or by prescription from time immemorial, or by user for forty or twenty years, pursuant to 2 & 3 Will. 4, c. 71, * s. 2 (*z*), a riparian proprietor may acquire a [*710] right to use the water in a manner not justified by his natural right:[1] but such acquired right is an easement, and has no operation against the natural rights of a landowner higher up the stream, unless the user by which it was acquired affects the use that he himself has made of the stream, or his power to use it, so as to raise the presumption of a grant, and so render the tenement above a servient tenement (*a*). Nothing short of twenty years' undisturbed possession of water diverted from the natural channel, or raised by a weir, can give a party an adverse right against those whose lands lie lower down the stream, and to whom it is injurious; a possession of above nineteen years is not sufficient (*b*). A riparian proprietor derives his right in respect of the water from possession of *land abutting on the stream*, and if, by a deed which conveys only land not abutting on the stream, he affects to grant water rights, the grant, though valid as against the grantor, can create no rights for an interruption of which the grantee can sue a

(*y*) Chasemore *v.* Richards, *supra*.

(*z*) *Ante*, sect. 1.

(*a*) Sampson *v.* Hoddinott, 1 C. B., N. S. 590; 3 Id. 596; 26 L. J., C. P. 148; Wright *v.* Williams, 1 M. & M. 77; Murgatroyd *v.* Robinson, 7 E. & B. 391; Wood *v.* Waud, 3 Exch. 778; Greatrex *v.* Hayward, 8 Exch. 291; Carlyon *v.* Lovering, 1 H. & N. 797; Gale, 262, 254 (4th ed.).

(*b*) Prescott *v.* Phillips, cited 6 East, 213.

[1] **Periods of prescription in America.** — These vary greatly in the different states. Several of the states have special statutes fixing the periods of prescription in incorporeal easements. In Massachusetts, Maine and Indiana, the period is twenty years, in Connecticut it is fifteen years, and in Louisiana and Iowa, it is ten years. In many states there are no special statutory provisions fixing the length of a prescriptive period in case of easements unless implied from the limitations upon real actions.

It seems, however, to be "the policy of the courts . . . to limit the presumption to periods analogous to those of the statutes of limitation in all cases where the statutes do not apply." 2 Greenl. on Evidence (14th ed.) sec. 539. In Ohio, the limitation on real actions is twenty-one years.

third party in his own name (*c*). The abstraction of water from a natural stream openly and under a claim of right for a period of twenty years to a tenement *not abutting* on the stream will create no easement to have pure water flow down the stream to the point of abstraction (*d*).

The alveus or bed of a river. — A purchaser of land on the banks of a river takes, by his conveyance, the right of ownership of a moiety of the bed of the river ad medium filum aquæ (*e*).[1] The soil of the alveus is not the common property of the respective owners on the opposite sides of a river; the shore of each belongs to him as severalty, and extends usque ad medium filum aquæ; but neither is entitled to use it in such a manner as to interfere with the natural flow of the stream (*f*). A fence or bulwark on the bank is allowable, but the alveus is sacred (*g*). The mouth of a river comprehends the whole space between the lowest ebb and the highest flood mark (*h*).

Evidence. — The evidence must be similar, *mutatis mutandis*, to that in actions where a right of common is pleaded (*i*). The plaintiff may prove his alleged right either by grant, express or implied, or by prescription from time immemorial; or by user for forty or twenty years, pursuant to 2 & 3 Will. 4, c. 71, s. 2 (*k*); or as a natural incident to the [*711] * ownership of his mill or land. No act of appropriation of the water of a natural stream to a beneficial purpose by means of a mill or otherwise is necessary to entitle the plaintiff to complain of a wrongful diversion of the water from its natural channel (*l*). Where the plaintiff

(*c*) The Stockport W. W. Co. *v.* Potter, 3 H. & C. 300; 10 Jur., N. S. 1005. But see Nuttall *v.* Bracewell, 4 H. & C. 714; L. R., 2 Exch. 1; 36 L. J., Ex. 1.

(*d*) Id.

(*e*) Crossley *v.* Lightowler, L. R., 3 Eq. 279; 2 Ch. Ap. 478; 36 L. J., Ch. 584.

(*f*) Bickett *v.* Morris, L. R., 1 H. L. Cas. 47; 12 Jur., N. S. 802.

(*g*) Id.

(*h*) Horne *v.* Mackenzie, 6 Cl. & Fin. 628.

(*i*) See Res. Ev. (13th ed.), p. 776.

(*k*) *Ante*, 670; Hale *v.* Oldroyd, 14 M. & W. 789, 793; Northam *v.* Hurley, 1 E. & B. 665; Whitehead *v.* Parks, 2 H. & N. 870; Whaley *v.* Laing, Id. 476; 3 Id. 675; 27 L. J., Ex. 422; Nuttall *v.* Bracewell, 4 H. & C. 714; L. R., 2 Ex. 1.

(*l*) Gale, 299.

[1] See *ante*, note, "Ownership of beds of streams, ponds, &c., in America."

claims a right to a flow of water "by reason of his possession of a mill," but proves a right by reason of his possession of the land on which the mill had been recently erected, he is entitled to the verdict (*m*). But the usual allegation that the plaintiff was possessed of mines, lands, &c., is not proved by evidence showing that he was lessee, not of the surface or banks, but only of mines, with liberty to use the streams for colliery purposes only (*n*). In case for the diversion of water the plaintiff alleged in his declaration a reversionary interest in three closes of land — to wit, *three ponds* filled with water, one pond being upon each of the said closes — and a right to the flow of the water into the said closes for supplying the said ponds in the said closes with water for the watering of cattle. The defendant traversed the right to the flow of the water as alleged. It appeared in evidence at the trial that the plaintiff had enjoyed an immemorial right to the flow of this water into an ancient pond in one of his closes, but that, above thirty years before, he made a new pond in each of the three closes, and turned the water so as to supply them, *and thenceforth disused the old pond*, which was gradually filled with rubbish and overgrown with grass. The plaintiff's right in respect of the three ponds having been defeated by proof of an outstanding life estate, under 2 & 3 Will. 4, c. 71, s. 7: held, that he was entitled under this declaration to recover in respect of his right to the flow of water to the *old* pond (*o*). Where it appeared in evidence that the channel had been dug about thirty years before action, it was held that a prescriptive right at common law was negative (*p*). But in such case the plaintiff may prove a right by user for twenty years; and if once a user as of right be proved to have commenced, it can be defeated only by subsequent interruptions not submitted to for one year.

(*m*) Ricketts *v.* Salwey, 2 B. & Adol. 360; Wood *v.* Waud, 3 Exch. 748, 773; in which Frankum *v.* Earl of Falmouth, 2 A. & E. 452; 6 C. & P. 529, is explained and distinguished.

(*n*) Insole *v.* James, 1 H. & N. 243.

(*o*) Hale *v.* Oldroyd, 14 M. & W. 789; and see Brown *v.* Best, 2 Wils. 174; Payne *v.* Shedden, 1 Moo. & R. 382; Drewett *v.* Sheard, 7 C. & P. 465; Ward *v.* Ward, 7 Exch. 838; 21 L. J., Ex. 334; Lovell *v.* Smith, 3 C. B., N. S. 120.

(*p*) Eaton *v.* Swansea W. W. Co., 17 Q. B. 267, 269.

On the other hand, the defendant may prove that the user was always contentious, and never as of right (*q*).

Action maintainable, although mode of enjoyment changed. — The occupier of a mill may maintain an action for any back water and injury to his mill, although he has not enjoyed it precisely in the [*712] same state for twenty years: and therefore it is no defence to such an action that the occupier has within a few years erected in his mill a wheel of different dimensions, but requiring less water than the old one (*r*). "The owner is not bound to use the water *in the same precise manner*, or to apply it to the same mill: if he were, that would stop all improvements in machinery" (*s*). Proof of a slight alteration by the plaintiff in the course of a stream above his land is not sufficient to destroy his right (*t*). But proof that the defendant, or the person through whom he claims, within twenty years enlarged certain weirs, &c., *so as to abstract more water* from the river than he had previously been accustomed to do, whereby the plaintiff's mill was injured, is sufficient; for although the defendant and his predecessors have on several occasions (long before the last twenty years) enlarged their weirs and deepened their channels, &c., so as to appropriate to themselves as much water from the river *as they from time to time wanted*, yet that will not justify a further abstraction of water from the river (*u*).

Artificial cuts or drains. — The right of a riparian proprietor, it was clearly established by Sampson *v.* Hoddinott, is limited to natural streams, and does not attach in the case of artificial cuts[1] or drains (*x*).[2] It is also settled that the flow of

(*q*) Eaton *v.* Swansea W. W. Co., *supra*.

(*r*) Saunders *v.* Newman, 1 B. & A. 258.

(*s*) Id. 261.

(*t*) Hall *v.* Swift, 4 Bing. N. C. 381.

(*u*) Bealey *v.* Shaw, 6 East, 208, explained 5 B. & Adol. 19; Gale, 216 (4th ed.); Mason *v.* Hill (in error), 5 B. & Adol. 1, 19; Brown *v.* Best, 1 Wils. 174; Moore *v.* Webb, 1 C. B., N. S. 673.

(*x*) Sampson *v.* Hoddinott, 1 C. B., N. S. 590; 3 Id. 596; 26 L. J., C. P. 148 (overruling Magor *v.* Chadwick, 11 A. & E. 571); and see Wardle *v.* Brockelhurst, 1 E. & E. 1058; 29 L. J., Q. B. 145; Gale, 81 (4th ed.).

[1] **Artificial watercourses.** — An artificial watercourse established by the owner of two lots which is necessary for the use of one of them cannot be diverted after the sale of the latter lot. Brakely *v.* Sharp, 10 N. J. Eq. 207.

water from a drain made by a landowner in his own land for the purposes of agricultural improvements for twenty years does not give a right to the neighbour, so as to preclude the landowner from altering the level of his drain for the improvement of his land (*y*), and that no right can be acquired under 2 & 3 Will. 4, c. 71, s. 2 (*z*), to the use of an artificial watercourse made for a particular and temporary purpose (*a*). An artificial watercourse or drain, however, may have been originally made for permanent purposes, and under such circumstances, and have been since used for such a period as to give all the rights that the riparian proprietors would have had if it had been a natural stream (*b*).

In Beeston *v.* Weate, the plaintiff and the defendant occupied contiguous portions of lands. For more than forty years, and as far back as living memory went, the occupiers of the plaintiff's land had been in the habit of passing over the defendant's land to a brook which lay on the other side of that land, and of damming up the brook when
* necessary, so as to force the water into an old artificial [*713]
watercourse which ran across the defendant's land to the plaintiff's land. They did this for the purpose of supplying their cattle with water, whenever they wanted the water, except when the owners of the defendant's land used the

(*y*) Greatrex *v.* Hayward, 8 Exch. 291; Wood *v.* Waud, 3 Exch. 778.
(*z*) *Ante*, sect. 1.
(*a*) Arkwright *v.* Gell, 5 M. & W. 203; 11 Exch. 610; Gale, 279—287 (4th ed.).
(*b*) Sutcliffe *v.* Booth, 32 L. J., Q. B. 136.

An aqueduct leading from one lot to another has been held to be an apparent and continuous easement upon the right to which the owner of the dominant lot can insist as against the owner of the servient lot from whose well it flows. De Luze *v.* Bradbury, 25 N. J. Eq. 70. It has been held that a right to the increased flow by artificial means through a natural channel may be acquired by prescription. Murchie *v.* Gates, 78 Me. 300.

[2] **Drains.** — At common law (so far as civil law principles have not been incorporated into it) there exists no right on the part of a proprietor to conduct his drainage of surface water or marshes or otherwise upon the land of another person. Dickinson *v.* City of Worcester, 7 Allen (Mass.) 19. But if the owner of two lots establishes a permanent and necessary drain between them, under the law, at least as held in New Jersey, a purchaser of one of the lots is entitled to the benefit of the drain. Kelly *v.* Dunning, 43 N. J. Eq. 62. And it should be said that the civil law theory that an inferior lot is bound to receive the drainage of a superior lot, prevails in some of the common law states.

water, as they did at certain seasons of the year, for irrigation. It was held, that upon this evidence the jury was warranted in inferring an user, as of right, by the occupiers of the plaintiff's land, of the easement on the defendant's land; and that, for the interruption of such easement, the plaintiff might maintain an action against the defendant (*c*).

Implied grant or reservation of drains, &c. — Where the owner of two or more adjoining houses sells and conveys one of them to a purchaser, such house is entitled to the benefit, and is subject to the burthen, of all existing drains communicating with the other house, without any express reservation or grant for that purpose: an *implied* grant or reservation (as the case may require) will be presumed in the absence of express words to the contrary (*d*). It makes no difference in this respect that the purchaser did not know of the drains under his house, if he might have ascertained their existence upon a careful inspection by a person ordinarily conversant with the subject, and it will be deemed his own fault if he did not do so at the time of his purchase (*d*). Two properties, which adjoined, were originally possessed by the same owner, in one of which was a cesspool and a drain to carry the water from the adjoining property, which was a tan-yard. The owner afterwards sold the property to different persons, and the conveyances contained no reference to the drain and cesspool: — held, that there was an implied grant of the easement of the cesspool in the conveyance of the tan-yard (*e*). Where the plaintiff excepts and reserves to himself the right to make and use a sewer in land conveyed by him to the defendant, whereby the *exclusive* use of such sewer is reserved to the plaintiff, he may maintain an action against the defendant for opening and using the sewer (*f*). So where the defendant grants to the plaintiff the use of water, subject to a proviso for the use thereof by the defend-

(*c*) Beeston *v.* Weate, 5 E. & B. 986; 25 L. J., Q. B. 115.

(*d*) Pyer *v.* Carter, 1 H. & N. 916, 921; 26 L. J., Ex. 258. But see *contra*, Suffield *v.* Brown (on appeal), 33 L. J., Ch. 249, 259; Polden *v.* Bastard, 7 B. & S. 130, 131.

(*e*) Ewart *v.* Cochrane, 4 Macq. H. L. Cas. 117; 7 Jur., N. S. 925; but see Suffield *v.* Brown, *supra*.

(*f*) Lee *v.* Stevenson, E., B. & E. 512; 27 L. J., Q. B. 263.

ant, the plaintiff may maintain an action on the deed for the abuse of such reservation by the defendant (*g*).

Licence to make or use drains, &c. — A parol licence to make a drain or watercourse *in the land of the licensor* will not, even after it has been fully executed at the expense * of the licensee, confer any right or title on [*714] him to have the use and benefit of the drain or watercourse free from obstructions; nor enable him to maintain any action against the licensor for obstructing such drain or watercourse without notice (*h*). But a licence attached to a valid grant of real or personal property is irrevocable, it being a licence coupled with an interest (*i*). No man can derogate from his own grant, nor can any person claiming through or under him. But a licence connected with an invalid grant is a mere licence (whether under seal or not), and may be revoked at any time (*k*), either expressly or by implication (*l*). A parole licence to erect a skylight, or a weir, or other easement *on the land of the licensee* cannot be revoked, after it has been executed at the licensee's expense, so as to render it necessary for the licensee to incur further expense in removing it (*m*).

Extinguishment or suspension of drains, &c. — Nothing of *absolute necessity* to a messuage or other building is extinguished by unity of ownership or possession; as a gutter in alieno solo to carry off water, &c., or a watercourse, or a way of necessity. They are merely *suspended as easements* during the joint ownership or possession, and will revive whenever the building or the land is conveyed to another (*n*).

(*g*) Rawstron *v.* Taylor, 11 Exch. 369.

(*h*) Hewlins *v.* Shippam, 5 B. & C. 221, 7 D. & R. 783; Cocker *v.* Cowper, 1 C., M. & R. 418; Greenslade *v.* Halliday, 6 Bing. 379; Mason *v.* Hill, 5 B. & Adol. 1; Wood *v.* Leadbitter, 13 M. & W. 838; Adams *v.* Andrews, 15 Q. B. 284; Taplin *v.* Florence, 10 C. B. 744; Raffey *v.* Henderson, 17 Q. B. 574; Roberts *v.* Rose, 3 H. & C. 162; 33 L. J., Ex. 1; affirmed in error, 4 H. & C. 103; L. R., 1 Ex. 82; 35 L. J., Ex. 62.

(*i*) Wood *v.* Manley, 11 A. & E. 34; Feltham *v.* Cartwright, 5 Bing. N. C. 569.

(*k*) Fentiman *v.* Smith, 4 East, 107; Wood *v.* Leadbitter, 13 M. & W. 838, 845; Taplin *v.* Florence, 10 C. B. 744, 764.

(*l*) Raffey *v.* Henderson, 17 Q. B. 574.

(*m*) Winter *v.* Brockwell, 8 East, 308; Liggins *v.* Inge, 7 Bing. 682; Harvey *v.* Reynolds, 12 Price, 724.

(*n*) Pheysey *v.* Vicary, 16 M. & W. 485, 489.

But it is otherwise with respect to ways not of necessity or other easements not of a continuous nature (*o*).

Underground water. — The principles which regulate the rights of owners of land in respect to water flowing *in known and defined channels*,[1] whether upon or below the surface of the ground, do not apply to underground water which merely percolates[2] through the strata in no known channels (*p*). The owner of land through which water flows in a subterranean course has no right or interest in it which will enable him to maintain an action against a landowner who, in carrying on mining operations on his own land in the usual [*715] manner, drains away * the water from the land of the first-mentioned owner, and leaves his well dry (*q*). The owner of a mill on the banks of a stream cannot maintain an action against a landowner who sinks a deep well on

(*o*) Pyer *v.* Carter, 1 H. & C. 916; Dodd *v.* Burchell, 1 H. & C. 113; 31 L. J., Ex. 364; Worthington *v.* Gimson, 2 E. & E. 618; 29 L. J., Q. B. 116; Pearson *v.* Spencer, 1 B. & S. 571, 583; 3 B. & S. 761; Polden *v.* Bastard, 4 B. & S. 258; 32 L. J., Q. B. 372; affirmed in error, L. R., 1 Q. B. 156; 7 B. & S. 130; 35 L. J., Q. B. 92.

(*p*) Chasemore *v.* Richards (in error), 2 H. & N. 168; 7 H. L. Cas. 349; 29 L. J., Ex. 81; Reg. *v.* The Metropolitan Board of Works, 3 B. & S. 710; 32 L. J., Q. B. 105; New River Co. *v.* Johnson, 29 L. J., M. C. 93; Ibbotson *v.* Peat, 3 H. & C. 644, 650.

(*q*) Acton *v.* Blundell, 12 M. & W. 324, 348; New River Co. *v.* Johnson, 29 L. J., M. C. 93; Galgay *v.* Great Southern and Western Railway Co., 4 Ir. Com. L. R. 456, Q. B.; Gale, 257—277 (4th ed.).

[1] **Underground streams.** — It has been held that the owner of land cannot divert underground water if it flows in a known and defined current. Burroughs *v.* Saterlee, 67 Iowa, 396; Smith *v.* Adams, 6 Paige (N. Y.) 435; Gould on Waters, sec. 281; Angell on Watercourses (7th ed.) secs. 112 & 112 a.

[2] **Water percolating in the soil,** whether beneath or above the surface, is generally held to belong absolutely to the owner of the soil. He may dig or bore for water in his own land even though he thereby drain his neighbor's well (Ocean Grove *v.* Asbury Park, 40 N. J. Eq. 447; Hougan *v.* Mil. & St. Paul R. R. Co., 35 Iowa, 558); or diminishes it (Greenleaf *v.* Francis, 18 Pick. (Mass.) 117); or otherwise diminishes his neighbor's water supply (Wheatley *v.* Baugh, 25 Pa. St. 528; Roath *v.* Driscoll, 20 Conn. 533; New Albany &c. R. R. Co. *v.* Peterson, 14 Ind. 112; Chatfield *v.* Wilson, 28 Vt. 49).

When the water percolating in the soil has been gathered into a stream and conveyed by the owner to adjoining land belonging to him upon sale of such adjoining land the grantee will take a right under an implied grant to the continuance of the water. Cross *v.* Kitts, 69 Cal. 217.

The rule that water percolating in the soil belongs to the owner of the land is not everywhere unqualifiedly admitted. Swett *v.* Cutts, 50 N. H. 439.

his own land and by pumps and steam-engines diverts the underground water which would otherwise have percolated through the soil and flowed into the river, by which, for more than sixty years, the mill was worked (*r*). "If a man has the misfortune to lose his spring by his neighbour digging a well, he must dig his own well deeper" (*s*). A mine-owner may work his coal in the manner most advantageous to himself, and remove a bar of coal therein to obtain the coal in such bar, although in consequence of his so doing the water floods an adjoining mine (*t*). But he has no right to pollute the water flowing through swallets in his own mine which communicate with a stream running into an adjoining mine (*u*). And after a demise of certain closes and all streams of water therein, reserving to the lessor all mines and minerals, with power to win and work the same, the lessor or his assigns cannot work the mines so as to cut off the springs in the closes demised (*x*).

Surface water. — A landowner has a right to appropriate surface water[1] which flows over his land *in no definite channel*, although the water is thereby prevented from reaching a watercourse which is previously supplied (*y*). He has an unqualified right to drain his land for agricultural purposes in order to get rid of mere surface water, the supply of the water being casual and its flow following no regular or definite course; and a neighbouring proprietor cannot complain that he is thereby deprived of such water, which otherwise would have come to his land (*z*). But where the water from

(*r*) Chasemore *v.* Richards (in error), 2 H. & N. 168; 7 H. L. Cas. 349; 29 L. J., Ex. 81; Reg. *v.* Metropolitan Board of Works, 3 B. & S. 710; 32 L. J., Q. B. 105; New River Co. *v.* Johnson, 29 L. J., M. C. 93; Ibbotson *v.* Peat, 3 H. & C. 644, 650; Gale, 266 (4th ed.).

(*s*) *Per* Bramwell, B., in Ibbotson *v.* Peat, 3 H. & C. 650.

(*t*) Smith *v.* Kenrick, 7 C. B. 515; Fletcher *v.* Rylands, 4 H. & G. 263; L. R., 1 Ex. 265; L. R., 3 H. L. Cas. 330; 37 L. J., Ex. 161; Baird *v.* Williamson, 15 C. B., N. S. 376.

(*u*) Hodgkinson *v.* Ennor, 4 B. & S. 229; 32 L. J., Q. B. 231.

(*x*) Whitehead *v.* Parks, 2 H. & N. 870.

(*y*) Broadbent *v.* Ramsbottom, 11 Exch. 602; 25 L. J., Ex. 115; Gale, 251 (4th ed.).

(*z*) Rawstron *v.* Taylor, 11 Exch. 369; 26 L. J., Ex. 33; Gale, 251 (4th ed.); Reg. *v.* Metropolitan Board of Works, 3 B. & S. 710; 32 L. J., Q. B. 105.

[1] See *ante*, note, "Whether surface water may constitute a watercourse."

a spring *flowed in a gully or natural channel* to a stream on which was a mill, the spring having been cut off *at its source* and the water received into a tank as it rose from the earth by the licence of the owner of the soil on which the spring rose, it was held, that an action lay by the millowner against the person so abstracting the water (*a*).

[*716] * **Flow of water from eaves.** — The flow of water for twenty years from the eaves of a house cannot give a right to a neighbour to insist that the house should not be pulled down or altered so as to diminish the quantity of water flowing from the roof (*b*). On the other hand, it seems that a man may by user acquire the easement or right to project his wall or eaves over the boundary line of his property, or to discharge the rain running from the roof of his house upon the adjoining land (*c*).

Sect. 5. — *Copyhold Rights, &c.*

Customary rights of copyholders. — The customary rights of copyhold tenants depend upon the special customs of the manor, and are not affected by the Prescription Act (2 & 3 Will. 4, c. 71), which is confined to easements and profits à prendre over the lands of another. They may therefore sometimes be established by less proof than thirty years' user (*d*).

Unusual incidents or burdens. — The owner of land cannot, at his pleasure, create new rights or incidents of property and annex them to it; or render it subject to a new species of burden, so as to bind it in the hands of an assignee (*e*). But covenants of a restrictive nature have frequently been enforced in equity, against the owner *or his assignees* who took with notice of them, actual or constructive.

(*a*) Dudden *v.* Guardians of Clutton Union, 1 H. & N. 627; 26 L. J., Ex. 146.

(*b*) Wood *v.* Waud, 3 Exch. 778.

(*c*) Thomas *v.* Thomas, 2 C., M. & R. 34.

(*d*) Hanmer *v.* Chance, 34 L. J., Ch. 413.

(*e*) Keppel *v.* Bailey, 2 Myl. & K. 535, Lord Brougham, C.; Hill *v.* Tupper, 2 H. & C. 121; 32 L. J., Ex. 217; Stockport Waterworks Co. *v.* Potter, 3 H. & C. 300; 10 Jur., N. S. 1005; compare last case with Nuttall *v.* Bracewell, 4 H. & C. 714; L. R., 2 Ex. 1; 36 L. J., Ex. 1.

Custom to grind at the manor mill. — A custom "that all the tenants, resiants, and inhabitants within a manor, should grind at the lord's mill all their corn and grain, as well growing within the manor as brought from other places, and spent or consumed in a ground state in their respective houses" within the manor, may be a good custom; but it does not extend to restrain the inhabitants who do not grow corn and grain, or who have no corn and grain of their own, from buying or using in such houses ground corn or flour, though it may not have been ground or grown within the manor, but produced from corn ground at other mills (*f*). And where, by a similar custom, the tenants were bound to grind at two ancient mills belonging to the lord, or one of them, at their own option, and the lord having pulled down one of the mills, so as to deprive the tenants of their option: it was held, that the custom was suspended (*g*).

*** Wind and air to a windmill.** — The owner of a wind- [*717] mill erected within living memory cannot claim, either by prescription, or by presumption of a grant arising from twenty years' acquiescence, to be entitled to the free and uninterrupted passage of the currents of wind and air to his mill: and such a claim is not within the 2 & 3 Will. 4, c. 71, s. 2, which is confined to rights of way or other easements to be exercised upon or over the surface of the adjoining land (*h*).

Use of a yard for certain purposes. — A reservation of a right to the use of a yard, for the occupiers of an adjoining messuage, in the same manner as the tenants had been accustomed to use the same, does not authorize the use of the yard by the tenants of a cottage built where a loft and open woodhouse under it, and forming part of the messuage, had stood at the time of the reservation (*i*).

Clothes lines to dry linen. — Proof of a privilege for the tenants of a house to hang lines across a yard adjoining for

(*f*) Richardson *v.* Walker, 2 B. & C. 827; Cort *v.* Birkbeck, 1 Doug. 218.

(*g*) Richardson *v.* Capes, 2 B. & C. 841.

(*h*) Webb *v.* Bird, 10 C. B., N. S 268; 13 Id. 841.

(*i*) Allan *v.* Gomme, 11 A. & E. 759; Henning *v.* Burnett, 8 Exch. 187; Gale, 317, 503, 523 (4th ed.).

the purpose of drying the linen *of their own families only* does not support a replication of a general right to put lines across and hang linen (*k*).

To mix dung, &c., on adjoining land. — A right or liberty to deposit and mix dung, muck, &c., upon adjoining land, and to make the same into manure and carry away the same, is a mere easement and not a profit à prendre (*l*).

Suspension and revival of necessary easements. — A *necessary* easement is suspended as long as the same person having a term of years in the land a quâ, and a fee-simple in the land in quâ is in possession of both; but it revives on a cessation of the unity of possession, though the change of possession be not accompanied with an alienation of the whole or either of the estates (*m*).

Sect. 6. — *Game, &c.*

(a) *Game Generally.*

What is "game." — By the Game Act (1 & 2 Will. 4, c. 32, s. 2), "the word 'game' shall for all the purposes of this act be deemed to include hares, pheasants, partridges, grouse, heath or moor game, black game and bustards." Sect. 12 only mentions "game," and therefore does not extend to rabbits (*n*). Sect. 30 gives a summary remedy against trespassers in search or pursuant of "game *or* woodcocks, [*718] snipes, quails, *landrails or conies." The 23 & 24 Vict. c. 90, requires a game licence to be taken out for the purpose of taking or killing "any game whatever, *or* any woodcock, snipe, quail or landrail, or any conies, or any deer." By 25 & 26 Vict. c. 114, entitled "An Act for the Prevention of Poaching" (sect. 1), "the word 'game' in this act shall for all the purposes of this act be deemed to

(*k*) Drewell *v.* Towler, 3 B. & Adol. 735.

(*l*) Pye *v.* Mumford, 11 Q. B. 660, 668, n. (*b*).

(*m*) Pheysey *v.* Vicary, 16 M. & W. 485, 489.

(*n*) Spicer, App., Barnard, resp., 1 E. & E. 874; 28 L. J., M. C. 176; Padwick, app., King, resp., 7 C. B., N. S. 88; 29 L. J., M. C. 42.

include any one or more hares, pheasants, partridges, eggs of pheasants and partridges, woodcocks, snipes, rabbits, grouse, black or moor game, and eggs of grouse, black or moor game." The meaning of the word "game" must be collected from the above enactments. "It is a perfectly undefined word, and one which has been used at various times in different senses, sometimes narrower, sometimes more comprehensive" (*o*). Game, whilst in confinement, may be the subject of larceny, and liable to a distress for rent (*p*).

Common law right of tenant to game. — At common law the right to take and kill game (in which, as in all animals feræ naturæ, there is no property) belongs to the tenant, and not to the landlord, by virtue of the tenant's property in the land (*q*). It is and has long been very common however for the landlord to reserve the right to the game in the contract of tenancy, and the Game Act of 1831 (1 & 2 Will. 4, c. 32) which did away with the numerous restrictions and qualifications (*r*), whereby a tenant was almost invariably prevented, even in a case where the game did not happen to be reserved to the landlord, from enjoying his right to it, has specially protected such reservations.

Reservation of game. — Where a reservation of game is spoken of, this (although from its common use in the Game Act and in leases it is more convenient to employ it) is not quite a correct term; when the lease reserves the game, and the tenant executes the lease, he by so doing regrants the game to the landlord (*s*), granting to the landlord a profit à prendre.

Parol reservation. — A profit à prendre, like other incorporeal hereditaments, can be granted by deed alone (*t*); but

(*o*) *Per* Erle, C. J., in Jeffryes *v.* Evans, 19 C. B., N. S. 246, 264.

(*p*) *Ante*, 439 (*l*).

(*q*) See Moore *v.* Earl of Plymouth, 7 Taunt. 614.

(*r*) Under the statutes repealed by the Act of 1831 the right was restricted to persons having freeholds to the amount of 100*l.* a year, or ninety-nine years' leases of 150*l.*, &c. The 7th section of the Act of 1831 gave the game to the landlord in cases where the occupation was under a lease (not being for more than twenty-one years) made previously to the passing of the act.

(*s*) Wickham *v.* Hawker, 7 M. & W. 103.

(*t*) See Bird *v.* Higginson, 2 A. & E. 696, and *ante*, 83.

to a certain extent a landlord may "reserve" game by writing without seal, or even by words alone (*u*). The Game Act (1 & 2 Will. 4, c. 32), in sect. 8, expressly speaks of a right of entry for sporting purposes "by lease, or [*719] any *written or parol *demise or contract*," and these words have been held to show by implication that a parol reservation is sufficient (*x*).

Terms of reservation in writing. — Most agricultural leases will be found to contain a reservation of the game to the lessor. It has been held upon the construction of such reservations, that a reservation to the landlord of the exclusive right of "hunting, shooting, fishing, and sporting," debars the tenant from shooting *rabbits* (*y*), but a grant of lease to hunt does not include a lease to shoot (*z*).

Agreement to preserve. — An agreement by the tenant not to destroy game is not a reservation of game to the landlord at all (*a*), but a covenant to preserve runs with the land, and may be sued on by an assignee of the reversion (*b*).

Grant of sporting rights to third person. — Sporting rights are frequently granted by a landlord to third persons. Such a grant has been held not to prevent the grantor from cutting down timber in the ordinary course of management of his estate, although the cutting down will prejudice the shooting (*c*), but not to allow the grantee to tread down the crops in an unreasonable manner (*d*), or to turn rabbits on the land (*d*), or game of any kind (*e*); and in Farrer *v.*

(*u*) See Reg. *v.* Thurlstone, 28 L. J., M. C. 106; Jones *v.* Williams, 46 L. J., M. C. 270; 36 L. T. 559.

(*x*) Jones *v.* Williams, 46 L. J., M. C. 270; 36 L. T. 559, *per* Grove, J.: "It may be taken as settled law that there may be a parol reservation of game on a parol demise." *Per* Lindley, J., ib. See also Reg. *v.* Thurlstone, 28 L. J., M. C. 106.

(*y*) Jeffryes *v.* Evans, 34 R. J., C. P. 261, 264; 19 C. B., N. S. 246.

(*z*) Moore *v.* Earl of Plymouth, 7 Taunt. at p. 667. See also Pickering *v.* Noyes, 4 B. & C. 639; Pannell *v.* Mill, 3 C. B. 625.

(*a*) Coleman *v.* Bathurst, L. R., 6 Q. B. 366; 40 L. J., M. C. 131; 24 L. T. 426.

(*b*) Hooper *v.* Clark, L. R., 2 Q. B. 200; 36 L. J., Q. B. 79.

(*c*) Gearns *v.* Baker, L. R., 10 Ch. 355; 44 L. J., Ch. 334; 33 L. T. 86; 23 W. R. 543; and see Pattison *v.* Gilford, L. R., 18 Eq. 259; 43 L. J., Ch. 524.

(*d*) Hilton *v.* Green, 2 F. & F. 821.

(*e*) Birkbeck *v.* Paget, 31 Beav. 403.

Nelson (*f*), where land was let with a reservation of sporting rights to the landlord, it was held that the tenant might recover damages from the party to whom the landlord had assigned such sporting rights for injury to the tenant's crops by pheasants coming to the crops from a wood (reserved to the landlord) to which they had been brought by such party in excessive numbers.

But if A. should demise twenty closes to B., with a right of shooting over all of them, and B. should covenant not to permit rabbits to become so numerous as to cause damage to A.'s tenants, it will be an answer to an action for breach of such a covenant that over some of the closes A. had not reserved the right of shooting because by such non-reservation A. rendered it impossible for B. to enter upon all the demised closes for the purpose of performing the covenant (*g*).

An exception of liberty for the tenants on the farms to kill rabbits with ferrets only extends to plantations let as farms subsequently to *the demise of the [*720] right of shooting (*h*). A grant to a person to come with servants or otherwise authorizes the grantee to hawk, &c., by his servants in his absence (*i*). A grant of the right of sporting to the lessee of the right in common with the lessor, his heirs and assigns, and any friend of him or them confers a privilege not confined to a single friend at a time (*k*).

Construction of power. — A power to demise lands or any part of them is not well exercised by a demise of part, with liberty of shooting over the whole (*l*). But a lease under a power may except and reserve all game, &c., on the demised premises to the lessor, his heirs and assigns, if apt and sufficient words be used (*m*).

(*f*) L. R., 15 Q. B. D. 258; Pollock, B., pointed out that "any person is entitled to bring on his land any quantity of game which can reasonably and properly be kept on it."

(*g*) Cornewall *v.* Dawson, 24 L.T. 664.

(*h*) Newton *v.* Wilmot, 8 M. & W. 711.

(*i*) Ewart *v.* Graham, 7 H. L. Cas. 331.

(*k*) Gardiner *v.* Colyer, 12 W. R. 979.

(*l*) Dayrell *v.* Hoare, 12 A. & E. 356.

(*m*) Pannell *v.* Mill, Bart., 3 C. B. 625; Jeffryes *v.* Evans, *supra*.

Rating of right of sporting, &c. — The Rating Act, 1874 (*n*), extends the operation of the poor rate acts to the right of sporting when severed from the occupation of the land (*o*), and provides that if such right is not let, and the owner of the right receives rent for the land, the occupier of the land may deduct from his rent such portion of the rate as is paid by him in respect of the increase, if any, of the rateable value; and that if the right of sporting is let, either the owner or lessee may be rated as the occupier. It had previously been held that when the right to take and kill game is reserved to the landlord, the tenant should be assessed to the poor rates according to the annual value of the land as reduced by such reservation (*p*); and that when the landlord himself occupied, he should be rated to the full value, notwithstanding he let off the shooting (*q*).

The sections of the Consolidating Act (1 & 2 Will. 4, c. 32), which principally affect landlord and tenant, are these:

Sect. 8 enacts, "nothing in this act contained shall authorize any person seised or possessed of or holding any land to kill or take the game, or to permit any other person to kill or take the game upon such land, in any case where by any deed, grant, lease or any written or parol demise or contract a right of entry upon such land for the purpose of killing or taking the game *hath been or hereafter shall be reserved or retained* by or given or allowed to any grantor, lessor, landlord or other person whatsoever."

[*721] ***Landlord may authorize other persons.** — By sect. 11, "where the lessor or landlord shall have reserved to himself the right of killing the game upon any land, it shall be lawful for him to authorize any other person or persons who shall have obtained an annual game certificate (*r*), to enter upon such land, for the purpose of pursuing and killing game thereon."

(*n*) 37 & 38 Vict. c. 54, ss. 3, 6, which see, 574, *ante*.

(*o*) See Rogers *v.* St. German's Union, 35 L. T. 332.

(*p*) Reg. *v.* Inhbts. of Thurlstone, 1 E. & E. 502; 28 L. J., M. C. 106; Reg. *v.* Williams, 23 L. T., O. S. 76; Reg. *v.* Guardians of Battle Union, L. R., 2 Q. B. 8; 8 B. & S. 12; 36 L. J., M. C. 1.

(*q*) Reg. *v.* Guardians of Battle Union, *supra*.

(*r*) Now a licence pursuant to 23 & 24 Vict. c. 90.

Penalty on tenant sporting. — By sect. 12, "where the right of killing the game (*s*) upon any land is by this act(*t*) given to any lessor or landlord, in exclusion of the right of the occupier of such land, or where such exclusive right hath been or shall be specially reserved by or granted to, or doth or shall belong to the lessor, landlord or any person whatsoever other than the occupier of such land, then and in every such case, if the occupier of such land shall pursue, kill or take any game (*u*) upon such land, or shall give permission to any other person so to do, without the authority of the lessor, landlord or other person having the right of killing the game upon such land, such occupier shall, on conviction thereof before two justices of the peace, forfeit and pay for such pursuit such sum of money not exceeding 2*l*., and for every head of game so killed or taken such sum of money not exceeding 1*l*., as to the convicting justices shall seem meet, together with the costs of the conviction" (*x*).

An agreement by the tenant not to destroy game, but to do all he can to preserve it, and to forbid other persons sporting at the request of the landlord, is not a "reservation" within the meaning of this section, so as to support a conviction of the tenant (*y*).

Summary proceedings against trespassers. — By sect. 30, after reciting that "after the commencement of this act game will become an article which may be legally bought and sold, and it is therefore just and reasonable to provide some more summary means than now by law exist for protecting the

(*s*) This does not extend to rabbits; Spicer, app., Barnard, resp., 1 E. & E. 874; 28 L. J., M. C. 176; Padwick, app., King, resp., 7 C. B., N. S. 88; 29 L. J., C. P. 80.

(*t*) The reference is to sect. 7, *which gave the game to the landlord* in all cases where the occupation was under a lease or agreement *made previously to the passing of the act* [5th October, 1831], excepting, however (*inter alia*), a lease for more than twenty-one years, so the section has ceased to operate for the last twenty-five years.

(*u*) *Ante*, 717.

(*x*) See Morden, app., Porter, resp., 7 C. B., N. S. 641; Osbond, app., Meadows, resp., 12 C. B., N. S. 10; 31 L. J., M. C. 238; Kenyon, app., Hart, resp., 6 B. & S. 249; 34 L. J., M. C. 87; Reg. *v.* Cridland and others, 7 E. & B. 853; 27 L. J., M. C. 28.

(*y*) Coleman *v.* Bathurst, L. R., 6 Q. B. 366; 40 L. J., M. C. 131; 24 L. T. 426; 19 W. R. 848 (Lush, J., diss.).

same from trespassers," it is enacted, "that if any person whatsoever shall commit any *trespass by entering or being*, in the daytime, upon any land in search or pursuit of *game or woodcocks, snipes, quails, landrails, or conies*, such person shall, on conviction thereof before a justice of the peace, forfeit and pay such sum of money, not exceeding 2*l.* as to the justices shall seem meet, together with the costs of [*722] conviction (*x*); *and that if any persons to the number *five or more together* shall commit any trespass by entering or being, in the daytime, upon any land in search or pursuit of game or woodcocks, snipes, quails, landrails or conies, each of such persons shall, on conviction thereof before a justice of the peace, forfeit and pay such sum of money, not exceeding 5*l.*, as to the said justices shall seem meet, together with the costs of the conviction (*x*): provided always, that any person charged with any such trespass shall be at liberty to prove, by way of defence, any matter which would have been a defence to an action at law for such trespass; save and except that the leave and licence of the occupier of the land so trespassed upon shall not be a sufficient defence in any case where the landlord, lessor or other person shall have the right of killing the game upon such land by virtue of any reservation or otherwise as hereinbefore mentioned; but such landlord, lessor or other person shall, for the purpose of prosecuting for each of the two offences herein last before mentioned, be deemed to be the legal occupier of such land, whenever the actual occupier thereof shall have given such leave or licence."

By sect. 31, "where any person shall be found upon any land in the daytime in search or pursuit of game, or woodcocks, snipes, quails, landrails or conies, it shall be lawful for any person having the right of killing the game upon such land by virtue of any reservation, or for the occupier of the land (whether there shall or shall not be any such right by reservation or otherwise), or for any gamekeeper or servant of either of them, or for any person authorized by either of them," to require the person so found to quit the land, and

(*x*) *Ante*, p. 721.

also to tell his name and place of abode, and, in case of refusal, to apprehend such person, &c. Sect. 32 gives protection against persons in pursuit of game, to the number of five or more, using violence.

Saving for hunting, &c. — By sect. 35, "the aforesaid provisions against trespassers and persons found on any land shall not extend to any person hunting or coursing upon any lands with hounds or greyhounds, and being in fresh pursuit of any deer, hare or fox already started upon any other land, nor to any person bonâ fide claiming and exercising any right or reputed right of free warren or free chase, nor to any gamekeeper lawfully appointed within the limits of any free warren or free chase, nor to any lord or any steward of the lord of any manor, lordship or royalty, or reputed manor lordship or royalty, nor to any gamekeeper lawfully appointed by such lord or steward within the limits of such manor, lordship or royalty, or reputed manor, lordship or royalty."

Defendant to prove any licence on which he relies. — By sect. 42, it is declared and enacted, "that it shall not be necessary, in any proceeding against any person under this act, to negative *by evidence any certificate, [*723] licence, consent, authority or other matter of exception or defence; but that the party seeking to avail himself of any such certificate, licence, consent, authority or other matter of exception or defence, shall be bound to prove the same" (*z*).

Informant need not be interested. — It is not necessary that a conviction under 1 & 2 Will. 4, c. 32, s. 30, for a trespass in search or pursuit of game, should purport to be, or should in fact be, at the instance or on the information of the owner or occupier of the land, or of a party interested in the game, or of a person authorized by such owner, occupier or party (*a*).

What is a trespass. — Any person trespassing in a highway, in search or pursuit of game, may be convicted under sect. 30 (*b*). But merely sending a dog into an adjoining cover

(*z*) See Reg. *v.* Wood, 25 L. J., M. C. 96; 1 Dears. & B. C. C. 1.

(*a*) Middleton *v.* Gale, 8 A. & E. 155; Morden, app., Porter, resp., 7 C. B., N. S. 641; 29 L. J., M. C. 213.

(*b*) Reg. *v.* Pratt, 4 E. & B. 860; 24

in search or pursuit of game is not a sufficient "trespass by entering or being" in or upon such cover, the act requiring a personal trespass (*b*). A person who, in his own land, shoots a pheasant in the land of another, and goes on such other land to pick the bird up, commits a trespass of entering land in pursuit of game within the meaning of sect. 30, the shooting and picking up the bird being one transaction (*c*). But entering land for the purpose of picking up dead game is not a trespass in pursuit of game within the meaning of that section, which only applies *to live* game (*d*).

Proof of mens rea not necessary. — Proof of a *mens rea* is not necessary to support a conviction under sect. 30. It is sufficient if there be evidence of a mere trespass in pursuit of game for which a civil action might be maintained (*e*). A *bonâ fide* claim of title to the land as owner thereof, or as acting with the authority of such owner, is sufficient to oust the jurisdiction of the justices under this section (*f*): but not a claim of a prescriptive right in gross to kill game on the land, there being no colour for such claim; nor a claim of title in a third person under whom the defendant does not justify (*g*); nor a claim on behalf of the public generally (*h*). The bona fides of the claim is for the justices to determine (*i*). A tenant cannot be convicted under this section for killing *rabbits* on land in his own occu-
[*724] pation; nor can any person *acting as his servant and *on his behalf* with his authority and not by way of sport (*k*). No leave or licence of the tenant or oc-

L. J., M. C. 113; 1 Dears. C. C. 502; Brown, app., Turner, resp., 13 C. B., N. S. 485; Mayhew, app., Wardley, resp., 14 C. B., N. S. 550; Howells, app., Wynne, resp., 15 C. B., N. S. 3; Stacey, app., Whitehurst, resp., 18 C. B., N. S. 344; 34 L. J., M. C. 94.

(*c*) Osbond, app., Meadows, resp., 12 C. B., N. S. 10; 31 L. J., M. C. 238.

(*d*) Kenyon, app., Hart, resp., 6 B. & S. 249; 34 L. J., M. C. 87.

(*e*) Morden, app., Porter, resp., 7 C. B., N. S. 641; 29 L. J., M. C. 213; followed in Watkins *v.* Major, L. R., 10 C. P. 662; 44 L. J., M. C. 164; 24 W. R. 164.

(*f*) Reg. *v.* Cridland, 7 E. & B. 853; 27 L. J., M. C. 28; Morden, app., Porter, resp., 7 C. B., N. S. 641; 29 L. J., M. C. 213; Legg, app., Pardoe, resp., 9 C. B., N. S. 289; 30 L. J., M. C. 108.

(*g*) Cornwell, app., Sanders, resp., 3 B. & S. 206; 32 L. J., M. C. 6.

(*h*) Leatt *v.* Vine, 30 L. J., M. C. 207.

(*i*) Legg *v.* Pardoe, 9 C. P., N. S 289; 30 L. J., C. P. 108.

(*k*) Spicer, app., Barnard, resp., 1

cupier to kill "game" will be of any avail where the game has been expressly reserved to the landlord or lessor or to any other person. In cases where any such leave or licence is available, it must *precede* the act of trespass (*l*); and must be proved by the party who relies on it (*m*). One who finds game on his own land cannot justify pursuing it on the land of another (*n*). A person whose game is enticed away from his land by a neighbour is liable to an action for exploding combustibles on his own land so as to be a nuisance to his neighbour, in order to frighten the game away from his land and to prevent him from killing them and from enticing other game (*o*). The owner of land in his own occupation has a property in game and rabbits started and killed thereon by a poacher, or strangers acting without his leave; and he may maintain trover for such dead game or rabbits (*p*). But where a poacher starts game on the land of A. and kills it on the adjoining land of B., it would rather seem to belong to the poacher than to A. or B. (*q*).

Arrest by tenant of trespassers and poachers. — Whether the game belongs to the tenant or not, he is in general authorized by the Game Laws to arrest trespassers in search of game or poachers. Thus, in the case of poachers by day, the tenant may require them to quit the land and demand their name and abode: and if they refuse, or give a false or illusory name or place of abode, he may arrest them, and take them before a justice (*r*). So by the Night Poaching Act he may arrest the poachers if found on the land, or pursue them beyond the lands (*s*).

Action by tenants against trespassers. — The tenant has in

E. & E. 874; 28 L. J., M. C. 176; Padwick, app., King, resp., 7 C. B., N. S. 88.

(*l*) Morden, app., Porter, resp., 7 C. B., N. S. 641; 29 L. J., M. C. 213.

(*m*) Sect. 42; *ante*, 722.

(*n*) Deane *v.* Clayton, 7 Taunt. 489.

(*o*) Ibbotson *v.* Peat, 3 H. & C. 644; 34 L. J., Ex. 118.

(*p*) Earl of Lonsdale *v.* Rigg, 11 Exch. 654; 1 H. & N. 923; Blades *v.* Higgs, 12 C. B., N. S. 501; 13 Id. 844; 11 H. L. Cas. 621; 34 L. J., C. P. 286.

(*q*) Id. Churchward *v.* Sheddy, 14 East, 249; 2 Selw. N. P. 833 (13th ed.). But see *contra*, *per* Lord Chelmsford, 34 L. J., C. P. 291.

(*r*) 1 & 2 Will. 4, c. 32, s. 31; Paterson Game L. 58.

(*s*) 9 Geo. 4, c. 69, s. 2; Paterson Game L. 94; and see "An Act for the Prevention of Poaching," 25 & 26 Vict. c. 114.

general the same remedy against trespassers on his lands as the landlord or owner would have; and though when the game belongs to the landlord, the tenant has no remedy against his landlord or any persons shooting with his permission, yet he may proceed against ordinary trespassers, either by action or under the Game Acts when applicable.

Fox-hunting, &c. — There is no principle of law which justifies the trespassing over the lands of others for the purpose of fox-hunting as carried on in modern times (*t*). This was laid down in Paul *v.* Summerhayes, in which [*725] case *an assault by a farmer's son upon two persons following the Taunton Vale foxhounds, who persisted in entering upon a field of his father, was held to be justified; and it was pointed out that the early case (*u*) in which it was thought to have been decided otherwise, must be restricted to the destruction of a noxious animal for the good of the public. In case of hunting or coursing with hounds or greyhounds, and being in fresh pursuit of any deer, hare or fox already started upon any other land, though there is no summary remedy under the Game Act (*x*), an action may be brought by the tenant (*y*).

Game licence to tenants. — Where a tenant is entitled to the game on his lands, he requires, in general, a game licence, like other persons, to enable him to take, kill or pursue game. The exceptions to the necessity of this licence as regards the killing of hares and rabbits by tenants will be dealt with presently (*z*). As regards other game, the tenant must be licensed like other persons (*a*). As regards deer, the tenant, if otherwise entitled, needs no game licence to kill them on his own lands (*a*). Nor does he need a game licence to catch woodcocks and snipes with nets or springs: but if he pursue or kill them otherwise, he requires a

(*t*) Paul *v.* Summerhayes, L. R., 4 Q. B. D. 9; 48 L. J., M. C. 33; 39 L. T. 574; 27 W. R.

(*u*) Gundry *v.* Feltham, 1 T. R. 334; and see Essex *v.* Capel, Chit. Game L. 114; Paterson Game L. 62.

(*x*) 1 & 2 Will. 4, c. 32, s. 35.

(*y*) Deane *v.* Clayton, 7 Taunt. 489.

(*z*) *Post*, Sect. 6 (b), "Ground Game;" 11 & 12 Vict. c. 29, ss. 1, 2; Paterson Game L. 146, 147.

(*a*) 23 & 24 Vict. c. 90, s. 2.

licence (*a*): and he requires a licence to take, kill or pursue quails or landrails (*a*).

Gun licence. — It may be mentioned here that, by the Gun Licence Act, 1870 (33 & 34 Vict. c. 57), a ten-shilling gun licence must be taken out yearly for carrying a gun, and that the penalty for carrying a gun without licence is ten pounds. By the 7th section of that act, however, "the said penalty shall not be incurred by" (inter alios) "any person having in force a licence or certificate to kill game granted to him under the laws of excise in that behalf," or "by the occupier of any lands using or carrying a gun for the purpose only of scaring birds or of killing vermin on such lands, or by any person using or carrying a gun for the purpose only of scaring birds or of killing vermin on any lands by order of the occupier thereof, who shall have in force a licence or certificate to kill game, or a licence under this act."

Condition for re-entry on conviction. — A condition for re-entry in case the tenant or his assigns shall be convicted of any offence against the game laws will not enable an assignee of the reversion to maintain ejectment against the tenant for shooting without a licence, inasmuch as such condition does not run *with the reversion. So it [*726] was held in *Stevens* v. *Copp* (*b*); in which case, however, the judgment of Kelly, C. B., proceeded on the ground that shooting without licence was not an offence against the "game laws," but against revenue laws only.

(b) "*Ground Game.*"

Hares and rabbits being the subject of a special act of parliament in favour of the tenant, called the Ground Game Act, 1880, by sect. 8 of which the term "ground game" means hares and rabbits, may conveniently be considered together. Hares are "game" within the Game Act, 1831 (1 & 2 Will. 4, c. 32) sect. 2, but rabbits are not.

Agreement to keep down rabbits. — If the tenant agree to

(*b*) L. R., 4 Ex. 20; 38 L. J., Ex. 31.

become such on condition that the landlord will keep down rabbits, such an agreement is collateral and need not be in writing, although the occupation be under a lease required to be in writing by the Statute of Frauds, and although the lease reserves the right of shooting to the landlord (*c*).

Compensation for damage by rabbits. — When there was an agreement that the tenant would pay compensation for damage done by hares and rabbits, to an amount to be determined by arbitration, it was held that a reference to arbitration was a condition precedent to suing upon the agreement (*d*).

We have already seen that under a reservation of sporting the tenant is not entitled to kill rabbits (*e*), but that on a grant by the landlord to a third person of sporting rights, the grantee is not entitled to turn rabbits on the land (*f*). A tenant may kill rabbits on his own land without being liable to prosecution under the Game Act (1 & 2 Will. 4, c. 32, s. 30) (*g*).

In West *v.* Houghton (*h*) a lease was made between the plaintiff and defendant by which the plaintiff granted exclusive rights of sporting over his estate to the defendant, who covenanted that he would keep down rabbits so that no appreciable damage might be done to the crops. Appreciable damage was done to the crops of a tenant, but the plaintiff was not liable to compensate, nor did he compensate the tenant. It was held, in an action by the plaintiff for breach of covenant, that having suffered no damage himself, and not being a trustee for the tenant, he was entitled to nominal damages only.

By the Hare Act (11 & 12 Vict. c. 29) (*i*), a tenant [*727] if entitled to *the game, but not otherwise, may kill hares on his enclosed lands without a game licence, or may depute another person to kill them for him by an

(*c*) Morgan *v.* Griffiths, L. R., 6 Ex. 70; 40 L. J., Ex. 46; 23 L. T. 86; 19 W. R. 957.

(*d*) Dawson *v.* Fitzgerald, L. R., 9 Ex. 7; 43 L. J., Ex. 19.

(*e*) Jeffryes *v.* Evans, *ante*, 719 (*g*).

(*f*) Hilton *v.* Green, *ante*, 719 (*d*).

(*g*) Spicer *v.* Barnard, 28 L. J., M. C. 176.

(*h*) L. R., 4 C. P. D. 197; 40 L. T. 364; 27 W. R. 678.

(*i*) This act seems now to be practically superseded by s. 4 of the Ground Game Act, 1880, 728, *post*.

authority to be registered with the clerk to the justices of the petty sessional division.

Certificate. — The Game Certificate Act (23 & 24 Vict. c. 90) dispenses with a certificate in the case of a person killing rabbits on his own land.

The Ground Game Act, 1880. — We now come to the Ground Game Act, 1880 (43 & 44 Vict. c. 47), which gives to all tenants holding under *leases made after the passing of that act* (7th September, 1880) a right to ground game concurrent with that of their landlords, and a similar "concurrent right" to tenants under tenancies from year to year created before the passing of the act, notwithstanding any reservation of the game to the landlord in the contract of tenancy.

The concurrent right. — By section 1, it is provided that "every occupier" shall have as incident to and inseparable from his occupation the right to kill and take ground game concurrently with any other person who may be entitled to kill and take ground game on the same land. The words "every occupier" here will clearly include the case of joint tenants in their own right, and probably also joint tenants in the right of another as trustees or executors; for in their representative capacity they are just as much interested in keeping down the game as their beneficiaries.

Limitations of the concurrent right. — But the same section limits the exercise of the right to the occupier himself or "persons duly authorized in writing," which persons must be either members of his household or persons in his ordinary service on the land "and any other person" employed for reward, and further provides that only one person may be authorized to kill the game with fire-arms.

Upon the limitations it is to be observed that the authority in writing need not necessarily be signed (*k*) (though it is desirable that it should be), and that air-guns — for which, however, a licence is required by the Gun Licence Act,

(*k*) In Pooley *v.* Driver, L. R., 5 Ch. D. 458, no doubt it was held that a contract in writing under Bovill's Act required signature; but the case appears not to be sufficiently in point to govern the present as an authority.

1870 — are not excluded. In case of a joint tenancy, the joint tenants must concur in giving the authority.

By sub-s. 1 (c) the authority must be produced to any person having the "concurrent right" or any person authorized by him in writing.

Sub-section 2 cuts down the words "every occupier" in section 1 by excluding persons of rights of common or an occupation for grazing or pasturage for not more than [*728] nine months; and section 3 *cuts down the time within which the concurrent right may be exercised in the case of moorlands or uninclosed lands to the time from 11th December to 31st March.

Concurrent right retained. — Section 2 provides for cases where game is not reserved and the tenant lets the right of sporting, and enacts that, although he shall so let it, "he shall nevertheless retain and have the same right to kill and take ground game as is declared by section 1 of the act."

The third section provides for the absolute indefeasibility of the "concurrent right" in the following unmistakable terms:

Agreements in contravention of right of occupier void. — "Every agreement, condition or arrangement which purports to divest or alienate the right of the occupier as declared given and reserved to him by this act, or which gives to such occupier any advantage in consideration of his forbearing to exercise such right, or imposes upon him any disadvantage in consequence of his exercising such right shall be void." "Void" here would seem to mean void only *quâ* the divesting, &c., of the right of the occupier (*l*).

Exemption from game licence. — The act contains no repeal or even mention of the Hare Act, but section 4 dispenses with the necessity for a game licence in the case of the occupier and the persons duly authorized by him.

Time for act coming into effect. — The act being printed at length in the Appendix, it only remains to notice here the provisions which regulate the *time* of its coming into effect.

1. Leases. — As regards *leases*, section 5 provides as fol-

(*l*) See Gaskell *v.* King, 11 East, 165.

lows: — "Where, at the date of the passing of this act (7th September, 1880), the right to kill and take ground game on any land is vested by lease, contract of tenancy, or other contract bonâ fide made for valuable consideration in some person other than the occupier, the occupier shall not be entitled under this act, until the determination of that contract, to kill and take ground game on such land."

2. Tenancies from year to year. — And as regards tenancies from year to year, the same section provides —

"For the purposes of this act, a tenancy from year to year, or a tenancy at will, shall be deemed to determine at the time when such tenancy would by law (*m*) become determinable if notice or warning to determine the same were given at the date of the passing of this act."

3. Contract for lease. — A tenant in possession under a contract, made before the passing of the act, for a lease to contain a stipulation reserving the ground game to the landlord, is bound to the landlord as if the lease had been actually executed before the act, and may be restrained by injunction from shooting ground game (*n*).

*A tenancy from year to year is, as has been [*729] already pointed out, determinable by half a year's notice (or longer) expiring at the end of some current year of the tenancy (*o*), or if the Agricultural Holdings Act applies by a year's notice expiring at the end of some current year of the tenancy (*p*).

A tenancy at will determines by the express declaration of either party (*q*).

Therefore, in Lady-day tenancies the act came into operation at Lady-day, 1880, and in Michaelmas tenancies at Michaelmas, 1880. In the case of tenancies at will, the act came into operation at once, i.e. on 7th September, 1880.

(*m*) Not by notice stipulated for between the parties. See Barlow *v.* Teal, L. R., 15 Q. B. D. 501, and 536, *ante*.

(*n*) Allhusen *v.* Brooking, L. R., 26 Ch. D. 559; 53 L. J., Ch. 520; 51 L. T. 57; 32 W. R. 657.

(*o*) Right *d.* Flower *v.* Darby, 1 T. R. 159.

(*p*) *Ante*, 335.

(*q*) Doe *d.* Bastow *v.* Cox, 11 Q. B. 122, and *ante*, 228.

SECT. 7. — *Metropolitan Building Acts.*

The old Metropolitan Building Act (14 Geo. 3, c. 78) has been repealed with the exceptions of sections 83 and 86 (*r*). Section 83 relates to the application of insurance money on houses burnt. It is a general enactment, and is not confined to the metropolitan district; but it does not extend to tenants' fixtures (*s*). Sect. 86 relates to legal proceedings in respect of accidental fires.

By the Metropolitan Fire Brigade Act, 1865 (28 & 29 Vict. c. 90), the duty of extinguishing fires and protecting life and property in case of fire shall, within the metropolis, be deemed for the purposes of this act to be entrusted to the Metropolitan Board of Works, who are to provide and maintain an efficient force of firemen, &c. (sect. 4).

Chimney on fire. — Sect. 23 enacts that "if the chimney of any house or other building within the metropolis is on fire, the occupier of such house or building shall be liable to a penalty not exceeding twenty shillings" (to be recovered in a summary way before two justices, sect. 24); "but if such occupier proves that he has incurred such penalty by reason of the neglect or wilful default of any other person he may recover summarily from such person the whole or any part of the penalty he may have incurred as occupier."

The 7 & 8 Vict, c. 84, for regulating the construction and use of buildings in the metropolis and its neighbourhood has been repealed (*t*), except as to sects. 54 to 63, which [*730] relate to certain dangerous, * offensive and noxious trades and businesses, and the erection of buildings near where they are carried on, and which provide for the discontinuance of such *dangerous* trades and businesses in certain localities within twenty years next after the passing of that act (*u*); and of such *offensive and noxious* trades and businesses within such localities, within thirty years (*x*), under heavy penalties, to be enforced in a summary way with costs.

(*r*) 28 & 29 Vict. c. 90, s. 34; 18 & 19 Vict. c. 122, s. 109; 7 & 8 Vict. c. 84, s. 1; Id. Sched. (A).

(*s*) *Ex parte* Gorley, *In re* Barker, 34 L. J., Bktcy. 1; 13 W. R. 60.

(*t*) 18 & 19 Vict. c. 122, s. 109.

(*u*) *I.e.* on or before 9th August, 1864.

(*x*) Before 9th August, 1874.

The Metropolitan Building Act, 1855 (*y*) now regulates the mode of constructing buildings in the metropolis and its neighbourhood. It extends to all places within the limits of the metropolis, as defined by the Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), and to all places to which such last-mentioned act may be extended, unless such places are, in making such extension, expressly excepted from the operation of the act (*z*). The following are the sections of the act bearing on the relation between landlord and tenant: —

Order on occupier for expenses. — By sect. 73, in default of the owner of any premises disobeying an order to pull down or repair a dangerous structure, an order for that purpose may be made upon an occupier. The owner is liable for the expenses, but "without prejudice to his right to recover the same from any lessee or other person liable to the expenses of repairs." By sect. 97 (sub-sect. 1), an occupier who is compelled to pay expenses under the act, in default of the owner, cannot be made to pay "any sum exceeding in amount the rent due, or that will thereafter accrue due in respect of such premises during the period of his occupancy." And by sub-sect. 5 of the same section, "any occupier of premises who has paid any expenses under this act, may deduct the amount so paid from any rent payable by him to any owner of the same premises," and, to provide for the case of a sub-lease, "any owner of premises who has paid more than his due proportion of any expenses may deduct the amount so overpaid from any rent that may be payable by him to any other owner of the same premises."

Saving for contract. — By sect. 111, nothing in the act contained "shall vary or affect the rights or liabilities, as between landlord and tenant, under any contract between them."

A contract for the erection of a building in contravention of the provisions of the above act cannot be enforced (*a*).

(*y*) 18 & 19 Vict. c. 122, as amended by 23 & 24 Vict. c. 52; 1 Chit. Stat. 435 — 458 (3rd ed.). And see Woolrych on the Metropolitan Building Act, 2nd ed., by Paterson, A.D. 1877.

(*z*) Sect. 4.

(*a*) Stevens *v.* Gourley, 7 C. B., N. S. 99; 6 Jur., N. S. 147.

A landlord is justified, under sect. 83 of the 18 & 19 Vict. c. 122, in entering premises in the occupation of his tenant from year to year, and pulling down and rebuilding [*731] the party-wall between it and the * premises belonging to him, without giving the notice required by sect. 85, such tenant not being an owner within the interpretation clause (sect. 3), and it is no objection that he has neglected to give the notice to the district surveyor required by sect. 38 (*b*). An occupier of premises, who has paid expenses under the above act may, by sect. 97, deduct the amount from the rent payable by him to any owner of the premises; but he is not thereby precluded from recovering his claim by action (*c*).

(*b*) Wheeler *v.* Gray, 6 C. B., N. S. 606. As to who is the "adjoining owner" and liable to contribute to the expense of repairing or rebuilding a party-wall, see Hunt *v.* Harris, 19 C. B., N. S. 13; 34 L. J., C. P. 249; Cowen *v.* Phillips, 23 Beav. 18.

(*c*) Earle *v.* Maugham, 14 C. B., N. S. 656; 10 Jur., N. S. 208.

*CHAPTER XIX. [*732]

RIGHTS AND LIABILITIES AS BETWEEN LANDLORD OR TENANT AND THIRD PERSONS.

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UNDER the practice before the Judicature Act there was occasionally some difficulty in regard to questions between landlords or tenants and third parties, in consequence of the distinction between the actions of "trespass" and "case" (*a*): but this is now no longer a difficulty, as the technical forms of actions have been abolished, and the pleadings are now statements of facts. The important questions of substance, — as to what are the cases in which a landlord is liable to or entitled to sue third parties, and what are those in which the right or liability attaches to the tenant, — will now be considered.

SECT. 1. — *Rights and Liabilities between Landlord and Third Persons.*

Right of action for damage to reversionary interest. — Where an injury is committed to the house or land of a person who had merely a reversionary interest therein, he is entitled to recover damages for the injury which his interest sustains (*b*)[1]:

(*a*) See Smith *v.* Milles, 1 T. R. 475; Wheeler *v.* Montefiore, 2 Q. B. 133, 156; Randal *v.* Stevens, 2 E. & B. 641; Barnett *v.* Earl of Guildford, 11 Exch. 19; Harrison *v.* Blackburn, 17 C. B., N. S. 678.

(*b*) Shadwell *v.* Hutchinson, 2 B. & Ad. 97; Thompson *v.* Gibson, 7 M. & W. 456; see also the principle recognized in Battishill *v.* Reed, 18 C. B. 696, 713; and see Hosking *v.* Phillips, 3 Exch. 168; Vowles *v.* Miller, 3 Taunt. 137.

[1] **Lessor's remedies against third parties.** — Trespass on the case is

and he may also have an action for continuing a nuisance, even after a former recovery for committing it (*c*). For

(*c*) This he must have formerly done by an action on the case and not trespass.

the appropriate remedy of the lessor at common law for injuries caused by third parties to the reversion.

Subject to statutory exceptions, as a rule it may be said that trespass *quare clausum fregit* will not lie in behalf of the lessor for injuries to the reversion. Campbell *v.* Arnold, 1 Johns. (N. Y.) 511; Tobey *v.* Webster, 3 Id. 468 (*per* Kent, Ch. J., the case was against a sublessee at will who had committed waste); Roussin *v.* Benton, 6 Mo. 592.

There are statutory exceptions to this rule, as for instance under a statute in Vermont for the protection of fish and game, the owner of premises leased to another party may maintain an action of trespass against one violating the law during the lease. Parmenter *v.* Caswell, 53 Vt. 6.

It was once held in Massachusetts in the famous case of Starr *v.* Jackson, 11 Mass. 519, that a lessor might maintain an action of trespass for injuries to the freehold, notwithstanding the premises were occupied at the time by a tenant at will, and this case was followed by a similar decision in Inh'b'ts of Hingham *v.* Sprague, 15 Pick. 102.

These decisions were rested upon the theory that the possession of a lessee at will was the possession of his lessor and were supposed to be justified by early English authorities. As we have seen, the same views were not entertained by Justice Kent, and, later, in Massachusetts (as was pointed out by Justice Wilde in French *v.* Fuller, 23 Pick. 104), after the passage of the statute prescribing notice to terminate a tenancy at will, the right of a lessee at will became so fixed that his possession could no longer consistently be called the possession of the lessor, and hence it was said that a lessor at will could no longer maintain trespass even under the authority of Starr *v.* Jackson.

Since the passage of the Practice Act, it is still necessary in that state for the lessor in declaring to allege an injury to the reversion, or he cannot recover. Dearborn *v.* Wellman, 130 Mass. 238; Bascom *v.* Dempsey, 143 Mass. 409.

And it was held in Woodman *v.* Francis, 14 Allen, 198, that tort *in the nature of trespass quare clausum fregit* would not lie if the injuries were alleged simply as in aggravation of the trespass.

In Bulkley *v.* Dolbeare, 7 Conn. 232, it was held that trespass *de bonis asportatis* would lie in behalf of a lessor for years against one carrying off timber which he had some time previously unlawfully felled.

In Hart *v.* Hyde, 5 Vt. 328, the general owner of personal property was allowed to maintain trespass against an officer who had unlawfully attached it notwithstanding it was leased, the owner having a right to take possession. As to correctness of this decision *quere*.

If personal property is leased for a definite time, lessor cannot maintain trespass. Putnam *v.* Wyley, 8 Johns. (N. Y.) 432.

Trespass will not lie for injuries which do not affect the reversion. Lindenbower *v.* Bentley, 86 Mo. 515 (reaping wheat); French *v.* Fuller, 23 Pick. 104 (entering and leasing premises to third parties); Drake *v.* Chicago &c. Ry. Co., 70 Iowa, 59; Townsend *v.* Isenberger, 45 Id. 670; Little *v.* Palister, 3 Me. 6 (treading down grass, and throwing down fences erected by lessee).

In Jordan *v.* Staples, 57 Me. 352, it was held that a lessor who had reserved

example, where the plaintiff demised a cottage, without excepting mines, it was held, that he might maintain an action on the case for the injury done to the cottage by a stranger, who had excavated coal, though it was not clear whether the injury was from an excavation under the cottage or under adjoining land in the occupation of the plaintiff (*d*). But the landlord's right is confined to the injury to his reversionary interest, inasmuch as he has no present possession of the property. He cannot *therefore maintain any action for the injury done by persons by merely riding on the property, though he might if they made holes in the soil so that the subsoil was injured, if the use of the surface only was demised (*e*). [*733]

Statement of claim. — The plaintiff in his statement of claim should show that he had a reversionary interest at the time of the injury being committed (*f*), but there is now a very large power of amendment vested in the judges. And even under the old system of procedure, where the plaintiff declared as for an injury to land in his possession, which turned out on the trial to have been in the possession of his tenant, the real controversy between the parties being whether the land was the plaintiff's property, and whether there was a right of way across it, it was held, that the judge had power to amend the declaration so as to adapt it to an injury to the plaintiff's reversionary interest (*g*).

What title sufficient. — The nature of the reversion to which the plaintiff is entitled is only so far material as to regulate the amount of damages to be recovered by him. A reversioner for a life estate, for instance, can only recover such damages for an injury to the estate during the term of

(*d*) Raine *v.* Alderson, 4 Bing. N. C. 702.

(*e*) Cox *v.* Glue, 5 C. B. 533.

(*f*) See Hosking *v.* Phillips, 3 Exch. 168; Vowles *v.* Miller, 3 Taunt. 137.

(*g*) May *v.* Footner, 5 E. & B. 505; 25 L. J., Q. B. 32.

right of storage might maintain trespass against party who had entered and carried away hay.

It has been held that trespass will lie against a tenant at will who has committed waste, because such trespass terminates the tenancy. Daniels *v.* Pond, 21 Pick. 367.

the lease as are equivalent to the injury done to the life estate (*h*).

Under the old practice, it was held to be fatal that the declaration alleged that the plaintiff had a reversion when the facts proved did not show any true relation of landlord and tenant (*i*). As the actual facts are now to be set out in pleadings this is no longer a danger, but at the same time it should always appear on the pleadings that the plaintiff has an interest entitling him to sue and what that interest is. It may be remarked, however, that payment of rent to a person has been held sufficient primâ facie evidence of a reversion being in him (*k*).

What is a sufficient act of injury. — A reversioner cannot sue for anything as an injury to his reversion, unless it permanently injures his estate, or operates in denial of his right (*l*), even though he may have suffered a pecuniary injury thereby (*m*): therefore a temporary fixing of barges and planks in a part of a river near certain premises, thereby obstructing the navigation of that part and hindering persons from passing to the premises and unloading boats thereon, is not an injury to the reversion (*n*). But a permanent [*734] obstruction of a way in denial of * the right is an injury to the reversioner (*o*). The reversioner may sue for an injury done to his house by the defendant's neglect to scour a watercourse in an adjoining close, whereby the watercourse was obstructed, and the water thrown back from the course into the house, doing damage to it thereby (*p*); or for an injury done to it by mining under it (*q*), or by

(*h*) Evelyn *v.* Raddish, Holt, 543.

(*i*) See Martin *v.* Goble, 1 Camp. 320; Partridge *v.* Bere, 1 D. & R. 272; Hitchman *v.* Walton, 4 M. & W. 409.

(*k*) Daintry *v.* Brocklehurst, 3 Exch. 207.

(*l*) Hopwood *v.* Schofield, 2 Moo. & R. 34; Baxter *v.* Taylor, 4 B. & Adol. 72; Simpson *v.* Savage, 1 C. B., N. S. 347; Metropolitan Association *v.* Petch, 5 C. B., N. S. 504; Cooper *v.* Crabtree, 45 L. T. 587.

(*m*) Mumford *v.* Oxford, Worcester, &c. Rail. Co., 1 H. & N. 34.

(*n*) Dobson *v.* Blackmore, 9 Q. B. 991.

(*o*) Kidgill *v.* Moor, 9 C. B. 364; 1 L., M. & P., 131; Hopwood *v.* Schofield, *supra*; see, too, Bell *v.* Midland Rail. Co., 30 L. J., C. P. 273; and Palk *v.* Skinner, 18 Q. B. 568, in which the point in question was apparently assumed.

(*p*) Bell *v.* Twentyman, 1 Q. B. 766; Taylor *v.* Stendall, 7 Q. B. 634; 3 D. & L. 161.

(*q*) See Raine *v.* Alderson, 4 Bing.

raising the pavement so much in front of it as to block up the entrance and the lower windows of it (*r*): or the erection of a wall, whereby his lights are obstructed (*s*): or for the erection on the defendant's house of eaves and a pipe overhanging and conducting water on land in the occupation of a tenant (*t*). An action is maintainable by a reversioner against the surveyor of a highway for cutting away part of a bank adjoining a public road, though the premises are thereby in fact improved, as the removal of any part of the land is an injury to the reversion (*u*). Where a lease reserves a limited power to the lessors to make a way across the land for certain purposes: in an action by the lessee as a reversioner for making a way across the land for other purposes, it is not a ground of complaint that the intention of the defendants was to use the way for other purposes than they had a right to use it; but the question is, whether at the time it was made it had become necessary or expedient for the defendants to make a way for the purposes for which they were entitled, and whether the road made was a proper road for that purpose, in which case the action will only lie, if at all, at the instance of the tenant in possession (*x*). The statement of claim should allege the injury to have been done to the damage of the reversion, or at least state an injury of such a permanent nature as to be necessarily injurious to the reversion (*y*).

Cause of action accrues when damage sustained. — The cause of action does not accrue, nor the Statute of Limitations begin to run, until actual damage is sustained (*z*).

A statement of claim in an action for an injury to the

N. C. 702; Backhouse *v.* Bonomi, 9 H. L. Cas. 503; 34 L. J., Q. B. 181.

(*r*) Leader *v.* Moxon, 3 Wils. 461.

(*s*) Jesser *v.* Gifford, 4 Burr. 2141; Shadwell *v.* Hutchinson, 2 B. & Adol. 97; Moo. & M. 350; 4 C. & P. 333; Turner *v.* Sheffield and Rotherham Rail. Co., 10 M. & W. 425; Metropolitan Association, &c. *v.* Petch, 5 C. B., N. S. 504.

(*t*) Tucker *v.* Newman, 11 A. & E. 40; Fay *v.* Prentice, 1 C. B. 828; Battishill *v.* Reed, 18 C. B. 696; 25 L. J., C. P. 290.

(*u*) Alston *v.* Scales, 9 Bing. 3.

(*x*) Durham and Sunderland Rail. Co. *v.* Walker, 2 Q. B. 940.

(*y*) Jackson *v.* Pesked, 1 M. & S. 234; Dobson *v.* Blackmore, 9 Q. B. 991; Kidgill *v.* Moor, 9 C. B. 364; 1 L., M. & P. 131.

(*z*) Backhouse *v.* Bonomi, 9 H. L. Cas. 503; 34 L. J., Q. B. 181.

reversionary interest of the plaintiff by obstructing ancient lights, is sufficient on demurrer if it show an obstruction which may operate injuriously to the reversion, [*735] either by its being of a permanent character, * or by its operating in denial of the right, and it will be assumed to have been so, after verdict (*a*). A nuisance from smoke or noise, although it may be an actionable injury to the tenant in possession, is not one to the reversioner (*b*), as it is only a temporary nuisance and one which may cease at any moment (*c*).

Right of action for permanent nuisance. — But where a nuisance is in its nature of a permanent character and will continue after the expiration of the term unless removed, and especially if it affect any easement, or the right and title to the demised premises, the reversioner may sue, the pleadings expressly alleging injury to his reversionary interest.

Measure of damage. — The measure of damage in any such action will be so much as the jury may think sufficient to compel the defendant to abate the nuisance; not the amount of the diminution of the saleable value of the reversion (*d*).

Liability of landlord to third persons. — As regards the liability of landlords to third persons,[1] it may be taken as a

(*a*) Metropolitan Association, &c. *v.* Petch, 5 C. B., N. S. 504.

(*b*) Simpson *v.* Savage, 1 C. B., N. S. 347; Mumford *v.* Oxford, Worcester and Wolverhampton Rail. Co., 1 H. & N. 34.

(*c*) See *per* Jessel, M.R., Jones *v.* Chappell, L. R., 20 Eq. 539.

(*d*) Battishill *v.* Reed, 18 C. B. 696; 25 L. J., C. P. 290.

[1] **Liability of landlord to third parties for nuisances and negligence.** — Lessor is liable for injuries to third parties from nuisances existing upon the demised premises at the commencement of the tenancy, as well as for subsequent negligence in care of portions of premises reserved for himself or of common portions of premises separately leased to different tenants (Swords *v.* Edgar, 59 N. Y. 28 (liable to servant of lessee for injuries caused by unsafe condition of premises at time of letting, and that notwithstanding lessee had covenanted to repair); Moody *v.* Mayor of N. Y., 43 Barb. (N. Y.) 282 (liable to owner of vessel injured at defective wharf); Staples *v.* Spring, 10 Mass. 72 (both the maker and the continuer of the nuisance are liable); Wenzler *v.* McCotter, 22 Hun, 60 (injury from mound of ice caused by leaders discharging water on sidewalk); Pickard *v.* Collins, 23 Barb. 444 (erecting barn, causing accumulations of manure, filthy water and noxious smells); Godley *v.* Hagerty, 20 Pa. St. 387 (injury to tenant's employee caused by the fall of building insecurely constructed and leased by owner with knowledge that heavy machinery was to be used in it); Campbell *v.* Portland Sugar Co., 62

general rule that the tenant and not the landlord is liable to third persons for any accident or injury occasioned to them by the premises being in a dangerous condition, and the only exceptions to this rule appear to arise when the landlord has either (1) contracted with the tenant to repair, or (2) when he has let the premises in a ruinous condition (*e*), or (3) when he has expressly licensed the tenant to do acts amounting to a nuisance (*f*).

Letting premises with nuisance. — There is no obligation towards a neighbour cast by law on the owner and proprietor of a house, merely as such, to keep it repaired in a substantial manner, his only duty being to prevent it from being a nuisance (*g*). When, however, the property of the landlord is let by him in a state which is a nuisance, and he is himself responsible for its being in such a state, he is liable. Therefore where the defendant, who was the owner of a building and a stack of chimneys near to a building of the plaintiff, demised them when the chimneys were known to him to be ruinous and in danger of falling upon the building of the plaintiff, and kept and maintained them in such ruinous state until they fell upon the plaintiff's building, which they did during the occupation of the tenant under such demise, from no default of such tenant, but by the laws of nature: — it was held, that an action for the injury the plaintiff had sustained from the fall of the chimneys would lie against the defendant, though he was not the occupier at the time of the fall (*h*). If the landlord remains liable for repairs * to the demised premises, that is [*736]

(*e*) Nelson *v.* Liverpool Brewery Co., L. R., 2 C. P. D. 311; 46 L. J., C. P. 675; 25 W. R. 877.

(*f*) White *v.* Jameson, L. R., 18 Eq. 303.

(*g*) Chauntler *v.* Robinson, 4 Exch. 163.

(*h*) Todd *v.* Flight, 9 C. B., N. S. 377; 30 L. J., C. P. 21; Gandy *v.* Jubber, 5 B. & S. 78; 33 L. J., Q. B. 151.

Me. 552; Wendell *v.* Baxter, 12 Gray (Mass.) 494; House *v.* Metcalf, 27 Conn. 631 (injury to traveller by his horse taking fright at sight of overshot wheel of mill too near the road); Fish *v.* Dodge, 4 Denio (N. Y.) 311 (injury to owner of adjoining dwelling by leasing premises for the manufacture of steam boilers in the compact part of the city of Albany); Owings *v.* Jones, 9 Md. 108), though not if they arose subsequently.

evidence of his continuing the nuisance (*i*), the fact, on the other hand, of the tenant being bound to repair being almost conclusive evidence that the landlord is not liable (*k*). An action lies against the landlord of a house, who employs workmen and superintends repairs, though the lessee pays for them, for a nuisance occasioned by the negligence of the workmen (*l*). A person who lets premises with a nuisance upon them, and subsequently receives rent, is liable for the continuance of the nuisance (*m*); and so if he relets them after the user of the buildings has created a nuisance, or if he has undertaken the cleansing and has not performed it (*n*).

Liability of landlord in respect of premises occupied from year to year. — Where a nuisance of a permanent character is created on land in the occupation of a tenant from year to year, the reversioner is liable for damage caused by it, if it is shown that since the creation of the nuisance and before the damage he renewed the tenancy. It has indeed been held that when a landlord might have given notice to quit and did not, such continuing of the tenancy is equivalent to a re-letting (*o*). This, however, is distinctly dissented from in the undelivered judgment of the Exchequer Chamber in Gandy *v.* Jubber (*p*), which would appear to be good law, although not technically a decision of the Court of Error. And apparently on the same principle as that of the latter judgment, where a weekly tenant used a house as a brothel, and the landlord received an additional rent by reason of its occupation for such purpose, the latter, it was held, could not be convicted for keeping such a house merely because, having notice of the use the house was put to, he abstained from giving his tenant notice to quit (*q*).

(*i*) Pretty *v.* Bickmore, L. R., 8 C. P. 401; 28 L. T. 704; 21 W. R. 733; Gwinnell *v.* Eamer, L. R., 10 C. P. 658; 32 L. T. 835; see, too, Payne *v.* Rogers, 2 H. Bl. 349.

(*k*) Gwinnell *v.* Eamer, *supra*.

(*l*) Leslie *v.* Pounds, 4 Taunt. 649.

(*m*) Rosewell *v.* Prior, 2 Salk. 460; Todd *v.* Flight and Gandy *v.* Jubber, *supra*.

(*n*) Rich *v.* Basterfield, 4 C. B. 805.

(*o*) Gandy *v.* Jubber, 5 B. & S. 78; 33 L. J., Q. B. 151; Bartlett *v.* Baker, 3 H. & C. 153; 34 L. J., Ex. 11; Rex *v.* Pedley, 1 A. & E. 822.

(*p*) 9 B. & S. 15, n.

(*q*) Reg. *v.* Barrett, 32 L. J., M. C. 36; Reg. *v.* Stannard, 33 L. J., M. C. 61; 1 Leigh & Cave C. C. 349, cited in 5 B. & S. 83, *per* Compton, J.

A landlord may be liable for the continuance of a nuisance in erecting a building, though he has no right to enter upon the land and remove it (*r*); but he is not liable in respect of a new nuisance created by his tenant during the term if he bought the reversion during the tenancy (*s*).

Although the owner of property may, when he himself occupies, be responsible for injuries arising from acts done upon that property by persons who are there by his permission, though not * strictly his agents or servants, [*737] such liability attaches only upon parties in actual possession (*t*). Where, therefore, an action was brought by an adjoining owner against A., the owner of premises, for a nuisance from the smoke of a chimney, on the ground that A., having erected the chimney, and let the premises with the chimney so erected, had impliedly authorized the lighting of a fire therein, it was held, that the action would not lie; and it was further held, that as the premises were in the occupation of B., a tenant at the time the fires were lighted, A. was entitled to a verdict on a plea of "not possessed," the allegation as to possession having reference to the time when the nuisance complained of was committed, and not to the time at which the chimneys were erected (*u*). The fact of an assignment of the reversion will not necessarily relieve a landlord of his liability for the continuance of a nuisance originally caused by him, for before the assignment he was answerable for all the consequential damages: and it is not in his power to discharge himself by granting it over, though the action may be brought against the assignee (*x*).

Liability for nuisance contemplated by lease. — Although where a nuisance is caused by the act of a tenant, the landlord is not usually liable, yet if the act is one expressly contemplated in and authorized by the lease the landlord may

(*r*) Thompson *v.* Gibson, 7 M. & W. 456.

(*s*) Rex *v.* Pedley, 1 A. & E. 822; see, too, Saxby *v.* Manchester, Sheffield and Lincolnshire Rail. Co., L. R., 4 C. P. 198; 38 L. J., C. P. 153.

(*t*) Rich *v.* Basterfield, 4 C. B. 783; Reedie *v.* London and North Western Rail. Co., 4 Exch. 244; Chauntler *v.* Robinson, Id. 163; Bishop *v.* Trustees of Bedford Charity, 1 E. & E. 697; 28 L. J., Q. B. 215; 29 Id. 53.

(*u*) Rich *v.* Basterfield, 4 C. B. 783.

(*x*) Bull. N. P. 71.

be liable for any injury caused thereby (*y*), although the tenant if sued might have no defence to the action (*z*).

Sect. 2. — *Rights and Liabilities between Tenants and Third Persons.*

Right of tenant to sue for injury to demised premises. — In almost all cases it is the person in occupation of land and premises who is primâ facie entitled to maintain an action for an injury done to the property, even where the wrongful act has also injured the person entitled to the reversion so as to allow him also to sue.[1] And it may be sufficient that the tenant has a right only let to him and no property in the soil; for example, where the plaintiff was entitled, under a lease from the crown, to the sole right of digging lead in a certain district, to the soil of which she had no right, and let to another all her right so to dig during her term: it was held, that an action might be maintained against a person who wrongfully took the lead (*a*). Indeed, an action may [*738] be brought by a tenant *against a wrongdoer, although the tenant has no legal title other than actual possession; therefore, a person in possession of glebe land under a lease, void by reason of the rector's non-residence,

(*y*) Harris *v.* James, 45 L. J., Q. B. 544.

(*z*) White *v.* Jameson, L. R., 18 Eq. 303; 22 W. R. 761.

(*a*) Harker *v.* Birkbeck, 3 Burr. 1563; Taylor *v.* Eastwood, 1 East, 212.

[1] **Lessee's remedies against third parties.** — A lessee can maintain suits for damages against trespassers. Tex. & Pac. Ry. Co. *v.* Baylis, 62 Tex. 570. He may maintain case for injury to a franchise, as establishing an opposition ferry. Fraser *v.* Drynan, 4 Allen (N. B.) 74.

A tenant for life or for years, being himself liable for waste as an insurer to the lessor, may maintain an action of waste against a third party. Austin *v.* Hudson River R. R. Co., 25 N. Y. 334, 340; Cook *v.* Champ. Trans. Co., 1 Denio (N. Y.) 91, 104; Coale *v.* Han. & St. Jo. R. R. Co., 60 Mo. 227, 233, 234. Both lessor and lessee may bring separate actions each for his own separate injury, or the lessee may recover the whole damages in one suit. *Per* Allen, J., in Austin *v.* Hudson River R. R. Co., *supra*.

Innumerable cases might be cited to prove that a lessee may maintain an action of trespass against the lessor for interfering with his possession. Wadleigh *v.* Williams, 75 Ga. 272; Blake *v.* Coats, 3 G. Greene (Iowa), 548; Rees *v.* Baker, 4 G. Greene (Iowa), 461, &c., &c.

may yet maintain an action against a trespasser (*b*). A lessee for years, after his lease is expired, may also maintain an action for a trespass on the land before his lease was ended (*c*). But where a tenant's interest is determined, as, for instance, by the death of a tenant for life, under whom he holds, and he is then absent from the premises, and does no act indicating an intention to remain in possession, he is to be presumed to be out of possession, and therefore cannot sue (*d*). A lessee before entry has only an interesse termini (*e*), and cannot maintain an action for a trespass (*f*). Therefore, where a lease was made by way of mortgage, to hold from thenceforth, subject to a proviso that on nonpayment of the money on a certain day, the mortgagee might enter, he cannot maintain trespass for an entry made by a stranger before that day (*g*).

A lessee for life or years of land has no property in the trees growing on the land (*h*). Therefore, if a stranger cut down any trees, the lessee may sue for damages for the trespass, and perhaps for the loss of shade from the trees, but he cannot recover damages for their value, because the property of them is in the reversioner (*i*).

Liability of tenant to be sued for defective fences. — It is the duty of the tenant and not of the landlord, in the absence of special circumstances, to see that fences are in repair, so that cattle cannot stray on the land of others (*k*).

A person who rents the minerals under the land of another with a licence to make a shaft into it, is, in the absence of any stipulation to the contrary, under a legal obligation to the owner of the surface soil to fence the shaft so as to pre-

(*b*) Graham *v.* Peat, 1 East, 244.

(*c*) Bro. Tresp. 456; 2 Roll. Abr. 551, l. 46; Symonds *v.* Seaborne, Cro. Car. 325; Bedingfield *v.* Onslow, 3 Lev. 209; Evelyn *v.* Raddish, Holt N. P. C. 543.

(*d*) Brown *v.* Notley, 3 Exch. 219.

(*e*) Lowe *v.* Ross, 5 Exch. 553.

(*f*) Co. Lit. 296 b; Com. Dig. Trespass, B. 1, 2; Cole Ejec. 287, 549; Harrison *v.* Blackburn, 17 C. B., N. S. 678, 691.

(*g*) Wheeler *v.* Montefiore, 2 Q. B. 133; Turner *v.* Cameron's Coalbrook, &c. Co., 5 Exch. 932. See, too, Litchfield *v.* Ready, 5 Exch. 939.

(*h*) *Ante*, Ch. XVI., Sect. 7 (b).

(*i*) Esp. N. P. 384; 4 Co. R. 62 *a*.

(*k*) Cheetham *v.* Hampson, 4 T. R. 318.

vent it from being a source of danger to persons or cattle who may be rightfully upon it (*l*).

For nuisances in public ways, &c. — When any injury is caused to third persons by the state of the premises, it is always primâ facie the tenant who is liable (*m*).[1] For instance, it is the duty of the *occupier* (not of his landlord (*n*)) of a house, having an area fronting the public street, so to [*739] fence it as to *make it safe to passengers; and it is no defence to an action against him for neglecting to do so, whereby the plaintiff fell down into the area and was hurt, that when he took possession of the house, and as long back as could be remembered, the area was in the same open state as when the accident happened (*o*). The occupier is bound to see that his drains are in order (*p*). Again, the

(*l*) *Re* Williams *v.* Groucott, 4 B. & S. 149; 32 L. J., Q. B. 239.

(*m*) Reg. *v.* Watts, 1 Salk. 357; Cheetham *v.* Hampson, 4 T. R. 318. See, too, Rich *v.* Basterfield, 4 C. B. 783; Chamtler *v.* Robinson, 4 Exch. 163. As to the duties and liabilities of occupiers of adjoining premises for nuisances from defective drains, &c., see Humphries *v.* Cousins, L. R., 2 P. C. D. 239.

(*n*) Cheetham *v.* Hampson, 4 T. R. 318; Russell *v.* Shenton, 3 Q. B. 449; Rich *v.* Basterfield, 4 C. B. 783; Bishop *v.* Trustees of Bedford Charity, 1 E. & E. 697; 28 L. J., Q. B. 215; 29 Id. 53.

(*o*) Coupland *v.* Hardingham, 3 Camp. 390; cited 9 C. B. 417.

(*p*) Russell *v.* Shenton, 3 Q. B. 449.

[1] **Liability of lessee for injuries to third parties.** — A lessee is liable for injuries to third persons caused by the continuance of a nuisance existing at the commencement of the tenancy. Wharton on Negligence, sec. 817.

Guests, customers, or other parties, visiting the leased premises under an implied license, have a remedy against the lessee for injuries caused by the existence of nuisances on the premises. Shindlebeck *v.* Moon, 32 Ohio St. 264 (premises occupied as a post-office; Burdick *v.* Cheadle, 26 Id. 393, 397 (*per* McIlvaine, J.); City of Lowell *v.* Spaulding, 4 Cush. (Mass.) 277.

A lessee is liable for injuries caused by carelessness of a servant in leaving open a coal-hole leading from the sidewalk to the cellar (Stewart *v.* Putnam, 127 Mass. 405); or for damages caused by failure to repair (Lowell *v.* Spaulding, 4 Cush. 277) a sidewalk.

A lessee is liable to a co-tenant for injuries caused by the janitor's leaving open the faucet in urinal, under exclusive control of lessee, thereby injuring stock of goods belonging to co-tenant (Simonton *v.* Loring, 68 Me. 164); but otherwise if he have not exclusive control, and the injury be not proved to have arisen from his fault or that of his servants (Moore *v.* Goedel, 34 N. Y. 527).

It is held in Pennsylvania that the lessee of a building is the owner of it within the meaning of act of June 11, 1879 (P. L. 128), requiring owner to provide permanent fire escapes, and making him liable for injuries caused by want of them. Schott *v.* Harvey, 105 Pa. St. 222, 228.

occupier of land is bound to fence off any hole or area upon it which adjoins or is near to a highway, and is primâ facie liable for any damage arising from his neglecting to do so (*q*). If a grating on a public footway is broken, the occupier is primâ facie bound to repair it (*r*).

Liability of tenant. — The occupier of a house is primâ facie liable for an injury sustained by a person from the want of repair of the covering to a cellar (*s*), as he is even on criminal process where a public nuisance is caused by a ruinous house (*t*). The tenant in actual occupation may also be liable for the acts of persons who are on the property by his permission, though they are not strictly his agents or servants (*u*).

Sect. 3 — *Remedy by Injunction.*

In addition to the right to damages, which has been treated of in this chapter, there are many cases in which the parties aggrieved may obtain an injunction, but it is not usual to grant injunctions except in cases where the injury is of a permanent and irreparable nature (*x*); and if the applicant be a tenant, the injunction is usually limited in duration to the length of the tenant's interest in the property (*y*). An interlocutory injunction may be obtained on application made at any stage of an action, and either ex parte or after notice if the applicant be the plaintiff in the action; if any other party apply, notice must be given to the plaintiff, and the application cannot be made until after appearance by the party applying (*z*).

(*q*) Barnes *v.* Ward, 3 C. & K. 661; 9 C. B. 392; Hadley *v.* Taylor, L. R., 1 C. P. 53; Indermaur *v.* Dames, Id. 274.

(*r*) Gandy *v.* Jubber, 5 B. & S. 78, 485; 31 L. J., Q. B. 151; cited L. R., 4 C. P. 202. See, too, Daniels *v.* Potter, 4 C. & P. 262; Hughes *v.* Macfie and Abbot *v.* Macfie, 2 H. & C. 744; 33 L. J., Ex. 177; Proctor *v.* Harris, 4 C. & P. 337; Chapman *v.* Rothwell, E., B. & E. 168. See, too, Pretty *v.* Bickmore, L. R., 8 C. P. 401; Gwinnell *v.* Eamer, L. R., 10 C. P. 658.

(*s*) Payne *v.* Rogers, 2 H. Blac. 349; Tennant *v.* Golding, 1 Salk. 21, 360 770.

(*t*) Reg. *v.* Watts, 1 Salk. 357.

(*u*) Rich *v.* Basterfield, 4 C. B. 783; *per* Rolfe, B., in Reedie *v.* London and North-Western Rail. Co., 4 Exch. 244; Bishop *v.* Trustees of Bedford Charity, 1 E. & E. 697; 28 L. J., Q. B. 215; 29 Id. 53

(*x*) Story's Eq. Jur., sect. 925.

(*y*) Simper *v.* Foley, 2 Johns. & H. 555; 5 L. T., N. S. 669.

(*z*) Jud. Act, 1873, sect. 25 (8); R. S. C., Ord. LII., r. 4.

* CHAPTER XX.

RIGHTS AND LIABILITIES ON CESSER OF THE TENANCY.

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SECT. 1. — *Tenant's Duty, &c., at end of Tenancy.*

Tenant must deliver up the premises with all erections, &c. — The ordinary rule is, that the tenant must, on the expiration or sooner determination of his tenancy, deliver up to his landlord the peaceable and quiet possession of the demised premises, and every part thereof (*a*), together with all erections, buildings, improvements and fixtures which he is not entitled to remove; and the growing crops of every description. To this rule, however, there are important exceptions. First, there may be some stipulation in the lease to the contrary (*b*). Secondly, there may be a custom of the country for the tenant to hold over any part of the demised premises, or to take any of the crops, the proof of which custom lies on the tenant (*c*). Thirdly, the tenant is in some cases entitled to emblements or to a prolongation of his term in lieu thereof (*d*). If the tenant hold over without objection after the expiration of his term, he becomes a tenant on sufferance (*e*); and while he

(*a*) *Post*, Sect. 2 (a).

(*b*) Hyatt *v.* Griffiths, 17 Q. B. 505; Newson *v.* Smythies, 1 F. & F. 477; 3 H. & N. 840; 28 L. J., Ex. 97.

(*c*) Caldecott *v.* Smythies, 7 C. & P. 808, Parke, B.; see *post*, Sect. 4 (a), (b).

(*d*) *Post*, Sect. 3.

(*e*) *Ante*, 230.

continues such tenant it seems that he may remove such fixtures, &c., as he was entitled to remove during his original tenancy: but it is extremely dangerous to delay such removal until *after* his term expires (*f*).

Ejectment of subtenant. — If the tenant has let the whole or any part of the premises to a subtenant, who is in possession at the time of the determination of the term, he must get him out, for otherwise he will not be in a situation *to render that complete possession to which the [*741] landlord is entitled (*g*). If he omit to do so, the landlord may maintain an action against him for not having quitted and delivered up possession at the end of the term, and may recover in such action, as special damage, the costs of an ejectment against the subtenant (*h*). The landlord is also entitled to recover against him the reasonable damages and costs sustained by him in an action at the suit of a party to whom he had contracted to let the premises, but to whom the tenant's wrongful act had prevented him from delivering possession (*i*).

Power of landlord to break in. — A landlord breaking into premises by force at the end of the term renders himself liable to an indictment under the statutes relating to forcible entry (*k*);[1] but these statutes give no civil remedy, and there has been much difference of opinion on the point whether the tenant can recover any and what damages for a

(*f*) *Ante*, Ch. XVI., Sect. 8.

(*g*) Harding *v.* Crethorn, 1 Esp. 57; Ibbs *v.* Richardson, 9 A. & E. 849.

(*h*) Henderson *v.* Squire, L. R., 4 Q. B. 170; 38 L. J., Q. B. 73; 19 L. T. 601.

(*i*) Bramley *v.* Chesterton, 2 C. B., N. S. 592; 27 L. J., C. P. 23.

(*k*) See *post*, Ch. XXIII., S. 4; Taunton *v.* Costar, 7 T. R. 431.

[1] **Criminal liability for forcible entries in America.** — (*a*) The statement in the text is generally admitted to be true. It is usually held that the force essential to constitute a forcible entry or detainer is greater than that which will constitute a mere trespass.

See next note and *post*, ch. 23, sec. 5, notes.

(*b*) *Modifications.* — In several states there are modifications of the original statutes which so increase the *civil remedy* that restitution will be granted, although the force used in entering be only constructive. Whether they add any to the *criminal liability* is at least doubtful.

See *post*, ch. 22, sec. 1, note, "Proceedings for recovery," &c., subtitle (*c*), "Peculiar statutes," &c.

forcible entry so indictable.[1] In Newton *v.* Harland (*l*) it was held that the landlord could not acquire lawful posses-

(*l*) 1 M. & G. 644, *per* Tindal, C. J., and Bosanquet and Erskine, JJ. (diss.), Coltman, J. This case was tried three times.

[1] **Civil liability for forcible and other forbidden entries in America.** — (*a*) *General rule that trespass, quare clausum fregit, will not lie in any case.* — It is held in America, by the weight of authority, that the landlord or other person entitled to the immediate possession of real property is not liable to the lessee or other wrongful occupant in trespass, *quare clausum fregit*, for entering upon the premises by force, whether the force used be sufficient to constitute a crime or merely enough to constitute an ordinary trespass. Fifty Associates *v.* Howland, 5 Cush. (Mass.) 214 (entering upon premises, and ordering all persons to leave); Harris *v.* Gillingham, 6 N. H. 9 (tearing down chimneys, and pulling off boards from roof and sides of dwelling-house); Stearns *v.* Sampson, 59 Me. 568 (in this case lessor entered upon premises, removed part of the furniture, leased part of the premises, prevented access and carrying of food to parts still held by original lessee, &c.); Meader *v.* Stone, 7 Met. (Mass.) 147, 151 (in this case defendants climbed upon a barrel placed against the house, and broke a pane of glass in one of the windows, then reached in and unfastened the window, and so entered. The sick wife of the lessee was in the house, but this was not known to the lessor); Low *v.* Elwell, 121 Mass. 309 (the owner of the premises, by her agent, laid hands upon the lessee, and forcibly expelled her from the premises, &c.); Curtis *v.* Galvin, 1 Allen (Mass.) 215 (removing furniture and ejecting family of lessee); Carl *v.* Lowell, 19 Pick. (Mass.) 25 (entering and removing lessee's goods with care); Rollins *v.* Mooers, 25 Me. 192 (entering premises from which occupant had departed, and carefully removing and storing the remainder of his furniture not taken away safely near by); M'Dougall *v.* Sitcher, 1 Johns. (N. Y.) 42 (entering dwelling-house in evening, and removing furniture, the apprentices of lessee having left for the day, and locked up the premises, &c.); Estey *v.* Baker, 50 Me. 325 (entry upon premises occupied by a tenant at sufferance, and erection of a building upon the demised premises); Roberts *v.* Tarver, 1 Lea (Tenn.) 441 (setting back a fence on to the true line. The court say the wrongful occupant's exclusive remedy is forcible entry); Barnes *v.* Dean, 5 Watts (Pa.) 543 (entering and cutting and carrying away grass); Walton *v.* Jacob, 1 Dev. & Batt. (N. C.) L. 567 (cutting and carrying away wheat); Johnson *v.* Hannahan, 1 Strob. (S. C.) 313; Yeates *v.* Allin, 2 Dana (Ky.) 134; Estes *v.* Kelsey, 8 Wend. (N. Y.) 555; Gault *v.* Jenkins, 12 Wend. 488; Willard *v.* Warren, 17 Id. 257; Wilde *v.* Cantillon, 1 Johns. Cas. (N. Y.) 123; Ives *v.* Ives, 13 Johns. (N. Y.) 235; Hyatt *v.* Wood, 4 Id. 150, 158; Merriam *v.* Willis, 10 Allen (Mass.) 118; Carnavan *v.* Gray, 64 Cal. 5; Weeks *v.* Sly, 61 N. H. 89 (landlord removed lessee's goods into the yard, where they remained three weeks, and were injured by rain. Held not liable, either in trespass *quare clausum* or *de bonis*).

(*b*) *Remedies under the general rule in case undue force is used, or possession prematurely taken.* — The courts which hold that trespass, *quare clausum*, will not lie against one having right to possession hold usually that, if the force used in entering is undue, the wrongful occupant has a civil remedy for his injuries in some other form of trespass, as, for example, assault and battery for injuries to the person (Sampson *v.* Henry, 13 Pick. (Mass.) 36, lessor

struck lessee with a club); or trespass *de bonis asportatis* for injuries to the goods (Overdeer *v.* Lewis, 1 W. & S. (Pa.) 90). In Caldwell *v.* Julian, 2 Mills Const. (S. C.) 294, it was held that trespass *vi et armis*, though not *quare clausum fregit*, would lie against owner for pulling down house in night-time over the head of sleeping occupant. In Moore *v.* Boyd, 24 Me. 242, 247, it was held that trespass *quare clausum* would lie by a tenant at will against landlord for violently ejecting him without reasonable notice, because such proceeding violated his special right of possession.

(*c*) *Whether the rightful owner may become a trespasser ab initio.* — In Whitney *v.* Swett, 22 N. H. 10, it was held that trespass *quare clausum* would lie against a landlord who wantonly injured his tenant's goods, as by throwing them out, and tearing up the carpets without removing the nails, because the landlord thereby became a trespasser *ab initio*. This case as to the form of the remedy *seems* to conflict with the law, as laid down by Justice Foster, in Sterling *v.* Marden, 51 N. H. 217, 230, who says that if a licensee enter, and thereafter commit an assault and battery, the remedy is not trespass *quare clausum*. In this case a moderate use of actual physical force in entering against the opposition of inmates who stood in the doorway was held justifiable.

(*d*) *By many authorities the wrongful occupant has no redress if the rightful owner use only moderate force.* — Those courts, which, while they deny the right in any case to maintain trespass *quare clausum fregit*, admit the right to recover damages in some other form of action for injuries arising from the use of undue force, generally deny *any redress*, if the force used was moderate in degree, or was put forth in a proper self-defence after actually entering upon the premises. Mugford *v.* Richardson, 6 Allen (Mass.) 76 (after lessor and her agent had entered peaceably, lessee was forcibly removed from doorway, where she resisted further entrance: held, that she could not recover in assault and battery); Millay *v.* Millay, 18 Me. 387 (lessee if attacked after he has entered may defend himself); Sampson *v.* Stearns, 59 Me. 568; Low *v.* Elwell, 121 Mass. 309, &c.

(*e*) *The exceptional doctrine that trespass quare clausum fregit will lie under circumstances by the wrongful occupant against the rightful owner.* — This doctrine prevails in Connecticut, Vermont, Illinois, and possibly in other states, though there is considerable variance as to its application.

For example, in *Connecticut* the rightful owner has been held liable in trespass for peaceably entering in temporary absence of the wrongful occupant. Mason *v.* Hawes, 52 Conn. 13.

In Illinois it was held, in Wescott *v.* Arbuckle, 12 Ill. App. 577, that the owner was liable in trespass *quare clausum* for a forcible entry (constituting a breach of the peace). In Reader *v.* Purdy, 41 Ill. 282, which was trespass *quare clausum*, *de bonis asportatis* and assault and battery (three counts), it was held that occupant could recover for his own injuries, but not for injuries to the premises; and in Fort Dearborn Lodge *v.* Klein, 115 Ill. 177, the court held the rightful owner was not liable for a peaceable entry; and Mulkey, C. J., said he would not be liable for the use of force if it did not amount to a breach of the peace.

In Vermont it is held that trespass *quare clausum* will lie if the entry is a forcible one (within the technical meaning of the term) (Dustin *v.* Cowdrey, 23 Vt. 631; Whittaker *v.* Perry, 38 Vt. 107); but not for a peaceable entry (Mussey *v.* Scott, 32 Vt. 82: an entry into a house during the temporary absence of the wrongful occupant by forcing open the door, placing the furniture in the street, and fastening up the house was held justifiable).

In Indiana it was held, in Larne *v.* Russell, 26 Ind. 386, that trespass would

sion by a forcible entry after the expiration of the term, and that, therefore, an assault and expulsion could not be justified. But Newton *v.* Harland, though never expressly overruled (*m*) has been repeatedly questioned (*n*). In Beddall *v.* Maitland (*o*), however — which was not a landlord and tenant case, — Fry, J., observed that Newton *v.* Harland "settled the law on the subject," and laid down that although damages cannot be recovered merely for the eviction, they can be recovered for an independent wrong committed in the course of the eviction, such as an assault or an injury to furniture; and the law appears to be that a lessor, at the determination of the term, may enter forcibly into possession of the demised premises, and after civilly requesting the tenant to depart, may, in case of his refusal or neglect to comply with such request, gently lay hands upon him to turn or push him out; and in case of any resistance on his part, may use such force and violence as may be necessary to overcome such resistance (but no more), and so expel the tenant from the possession without being liable to an action of trespass quare clausum fregit, or for assault, at the suit of the tenant; although he may have made himself liable to an indictment for a forcible entry (*p*). But excess of violence must [*742] be avoided, and that * creates the principal difficulty

(*m*) Smith, L. & T. 331.

(*n*) Harvey *v.* Bridges, 14 M. & W. 437 — 442; 3 D. & L. 60; 1 Exch. 261; Jones *v.* Chapman (in error), 2 Exch. 803, 821; Davis *v.* Burrell, 10 C. B. 821, 825; Pollen *v.* Brewer, 7 C. B., N. S. 371; Appleton *v.* Murray, 8 W. R. 653; 1 Sm. L. C., notes to Taylor *v.* Cole.

(*o*) L. R., 17 Ch. D. 174; 50 L. J., Ch. 401; 44 L. T. 248; 29 W. R. 484.

(*p*) Davison *v.* Wilson, 11 Q. B. 890; Burling *v.* Read, Id. 904. See also Browne *v.* Dawson, 12 A. & E. 624; Scott *v.* Matthew Brown & Co., 50 L. T. 746.

lie for an entry not forcible; but the contrary was held in the previous case of Culver *v.* Smart, 1 Ind. 65.

(*f*) It should be borne in mind that there have been some extensions of the original doctrine of forcible entry and detainer in Kentucky, Missouri, Illinois, and perhaps some other states.

(*g*) *Forcible entry and detainer.* — This is sometimes a mixed civil and criminal remedy, sometimes purely civil, and sometimes a purely criminal remedy.

For a description of it, see ch. 22, sec. 1, note, "Proceedings for recovery of demised premises in America;" and ch. 23, sec. 5, note, "Forcible entry and detainer in America."

and danger in proceeding to expel a tenant in the manner above mentioned, and often renders it more advisable to proceed by action of ejectment (*q*). A proviso for re-entry, so framed as expressly to justify the lessor, on breach of any of the covenants, in forcibly resuming possession of the premises and expelling the tenant, which has long passed without objection (*r*), has been said by Fry, J., to be void as authorizing a forcible entry in contravention of the statutes (*s*). Where a landlord having, in respect of a breach of covenant, entered his tenant's premises in his absence, and put locks on the doors, and the tenant on his return broke the locks, it was ruled at Nisi Prius that the landlord, being lawfully in possession of the premises, might justify giving his tenant into custody under the Metropolitan Police Act (2 & 3 Vict. c. 47), ss. 54, 66 (*t*).

Encroachments are for benefit of landlord. — Encroachments made by a tenant from the adjoining waste, during the term, are primâ facie for the benefit of the tenant during the term, *and afterwards of his landlord*, unless it appear by some evidence that the tenant *at the time they were made* intended them for his own exclusive benefit, and not to hold them as he held the farm to which they were adjacent (*u*); and the consent of the landlord to an encroachment will not give the tenant the benefit of it (*x*). The landlord may afterwards maintain ejectment to recover possession of them with or without the other premises comprised in the lease (*y*).

(*q*) Cole Ejec. 70, 71. And see Smith L. & T. 331.

(*r*) See *e.g.* Kavanagh *v.* Gudge, 6 Scott, N. R. 508; 7 Id. 1025; 7 M. & G. 316; 1 D. & L. 928; Milner *v.* Myers, 15 L. J., Q. B. 157; Acocks *v.* Phillips, 5 H. & N. 183; Barry *v.* Glover, 10 Ir. Com. L. R. 113.

(*s*) Edwick *v.* Hawkes, L. R., 18 Ch. D. 199; 50 L. J., Ch. 577; 45 L. T. 168; 29 W. R. 914.

(*t*) Davis *v.* Burrell, 10 C. B. 821.

(*u*) Doe *d.* Lewis *v.* Rees, 6 C. & P. 610; Doe *d.* Earl of Dunraven *v.* Williams, 7 C. & P. 322; Doe *d.* Harrison *v.* Murrell, 8 C. & P. 134; Doe *d.* Lloyd *v.* Jones, 15 M. & W. 580; Andrews *v.* Hailes, 2 E. & B. 349; Doe *d.* Croft *v.* Tidbury, 14 C. B. 304; 23 L. J., C. P. 57; Kingsmill *v.* Millard, 11 Exch. 313; Earl of Lisburne *v.* Davis, L. R., 1 C. P. 259; 35 L. J., C. P. 193.

(*x*) Whitmore *v.* Humphries, L. R., 7 C. P. 1; 41 L. J., C. P. 43; 25 L. T. 496; 20 W. R. 79.

(*y*) Andrews *v.* Hailes, 2 E. & B. 349; Doe *d.* Croft *v.* Tidbury, 14 C. B. 304; Doe *d.* Earl of Dunraven *v.* Williams, 7 C. & P. 332; Cole Ejec. 248.

The covenants to repair, &c., contained in the lease will be held to extend, by implication, to the encroachments and the buildings thereon (*z*). The above-mentioned presumption, however, holds only as between the tenant and his landlord, and will not prevail for the landlord's benefit against third persons (*a*). A conveyance by a lessee of the encroachment to his son not appearing to have been delivered, and not followed by possession, does not rebut the presumption that the lessee made the encroachments for the benefit of his lessor (*b*). An indorsement on a lease, by which the lessee agrees to surrender all inclosures made by him at the end of his lease, and to pay 6*d.* annually, as an acknowledgment, is an admission they were made for the benefit of the lessor (*c*).

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Custody of lease. — On the expiration of a lease by forfeiture or otherwise, the lessor is not entitled to have the indenture of lease from the lessee (*d*).

Sect. 2. — *Consequences of holding over.*

(a) *Continuance of Liability.*

Tenant's liability by holding over. — The complete possession of the premises which the tenant is bound to give at the end of the tenancy must be given even where a subtenant wrongfully holds over and refuses to quit (*e*); the tenant is liable for the period of such holding over, but not for a whole year's rent (*f*). The landlord may, however, discharge the original tenant by accepting the subtenant as his immediate tenant (*g*). Where four persons, directors of a bank, hired a house for a year, before the expiration of which

(*z*) *In re* Newbury, White *v.* Wakeley, 26 Beav. 17; 28 L. J., Ch. 77.

(*a*) Doe *d.* Baddeley *v.* Massey, 17 Q. B. 373; Doe *d.* Bluck *v.* Moyes, 13 L. T., O. S. 325.

(*b*) Doe *d.* Lloyd *v.* Jones, 15 M. & W. 580.

(*c*) Doe *d.* Lloyd *v.* Jones, 15 M. & W. 580.

(*d*) Hall *v.* Ball, 3 M. & G. 252; Doe *d.* Earl of Egremont *v.* Pulman, 3 Q. B. 622; Elworthy *v.* Sandford, 3 H. & C. 330; 34 L. J., Ex. 42.

(*e*) Harding *v.* Crethorn, 1 Esp. 57.

(*f*) Ibbs *v.* Richardson, 9 A. & E. 849.

(*g*) Harding *v.* Crethorn, 1 Esp. 57.

negotiations were entered into for a further hiring, with an intimation to the lessor that the parties were different, but the negotiations were not perfected, though the premises were held over for another quarter; it was held, that all four were liable in an action for use and occupation, though two had ceased to be directors before the expiration of the first year (*h*). In a second action for subsequent use and occupation of the same premises, it was held, that if premises are let to two persons for a term, at the end of which one holds over with the assent of the other, both continue liable for the time the one actually occupies (*i*); but both will not be liable if the holding over has been without such assent (*k*). Where a tenancy from year to year has been determined by a regular notice to quit, the mere accidental detention of the key by the tenant (who has quitted the premises and removed his goods) for two days beyond the expiration of the term, does not amount to any evidence of use and occupation, so as to make him liable for another quarter (*l*).

To hold him * liable for a quarter's rent would fix [*744] him with a renewed tenancy for a whole year; which could not be created without the assent of *both* parties, and would render a fresh notice to quit necessary. In an action for rent of coal, the issue being whether the defendants, who had given notice to quit, had afterwards waived such notice and agreed to continue the tenancy; it was proved that after the time fixed had expired, they *continued for two months* working out certain portions of the coal — which, however, as they contended, it was usual for a tenant to take away on abandoning such a work. It was ruled, that it was for the jury to decide on this issue, whether or not the defendants, in remaining for the two months, intended to waive the notice and continue the tenancy. The jury found they did not, and the court refused to disturb their verdict (*m*). Where a person who took premises for nine months, with an

(*h*) Christy *v.* Tancred, 7 M. & W. 127.

(*i*) Christy *v.* Tancred, 9 M. & W. 438; Tancred *v.* Christy, 12 M. & W. 316.

(*k*) Id.; Draper *v.* Crofts, 15 M. & W. 166.

(*l*) Gray *v.* Bompas, 11 C. B., N. S. 520

(*m*) Jones *v.* Shears, 4 A. & E. 832.

option at the end of that time of taking a lease for seven, fourteen or twenty-one years, before the expiration of the nine months sublet the premises for six months after the nine, and the sublessee occupied them for that time, it was held, that the lessee was liable for a whole year's rent (*n*).

Creation of tenancy from year to year by holding over. — We have already seen that a tenant holding over after the expiration of a lease for years may be taken to hold upon such of the terms of the former lease as are consistent with a yearly tenancy, and that whether he does hold on any of such terms or how otherwise, is a question for the jury on the facts proved (*o*)[1]. Where a tenant holds over and nothing is said as to the amount of rent to be paid, it is not necessarily to be the same as before, but the landlord may be entitled to an increased rent if the circumstances exclude the first agreement from attaching to the subsequent holding (*p*). It would appear that where the landlord has given a notice to quit or pay a specified rent, he may recover that amount of rent if the tenant hold over, it being a question for the jury whether the tenant has acquiesced (*q*). Where the tenant held over, and paid rent after the expiration of a lease, which contained covenants for a particular mode of husbandry; it was held, that the landlord might compel him to perform such covenants, in the same manner as if they were still expressly agreed upon between them (*r*). A covenant in a lease for years, ending at Michaelmas, that the tenant shall and may retain and sow forty acres of wheat on the arable land demised (consisting of 213 acres), at the seed-time next after the term, and have the standing thereof till the harvest then next following, rent free, with the use of premises [*745] for the threshing, *&c., till a day named, is a term

(*n*) Waring *v.* King, 8 M. & W. 571.
(*o*) Hyatt *v.* Griffiths, 17 Q. B. 505, *ante*, 222.
(*p*) Elgar *v.* Watson, 1 Car. & M. 494; Mayor, &c. of Thetford *v.* Tyler, 8 Q. B. 95.
(*q*) Anon., Lofft, 153; Roberts *v.* Hayward, 3 C. & P. 432; Hyatt *v.* Griffiths, 17 Q. B. 505.
(*r*) Roe *d.* Jordan *v.* Ward, 1 H. Blac. 97.

[1] See *ante*, ch. 6, sec. 2, note, "Tenancies from year to year," &c. (*k*); also note, "Holding over different effects."

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which may be made incident to a tenancy from year to year (*s*).

(b) *Double Value (after Landlord's Notice).*

Action for wilful holding over. — An action for double the yearly value of the premises is given to the landlord in case of the tenant holding over after the landlord's demand of the premises in writing. It is enacted by 4 Geo. 2, c. 28, s. 1,[1] that "in case any tenant or tenants for any term *of life, lives or years*, or other person or persons who are or shall come into possession of any lands, tenements or hereditaments, by, from or under, or by collusion with such tenant or tenants, shall *wilfully hold over* any lands, tenements or hereditaments after the termination of such term or terms, and *after demand made*, and *notice in writing* given, for delivering the possession thereof by his or their landlords or lessors, or the person or persons to whom the remainder or reversion of such lands, tenements or hereditaments shall belong, his or their agent or agents *thereunto lawfully authorized*, then and in such case such person or persons so holding over shall, *for and during the time he, she or they shall so hold over*, or keep the person or persons entitled out of possession of the said lands, tenements or hereditaments as aforesaid, pay to the person or persons so kept out of possession, their executors, administrators or assigns, *at the rate of double the yearly value* of the lands, tenements and hereditaments so detained, for so long time as the same are detained, to be recovered in any of his majesty's courts of record;" and it is added that against the recovering of the said *penalty* there shall be no relief in equity.

(*s*) Hyatt *v.* Griffiths, 17 Q. B. 505.

[1] **Double value.** — Provisions more or less similar to the above-cited statute have been enacted in the following states, and perhaps in others: viz., New York (3 Rev. Sts. Title IV. ch. 1, sec. 10, 11); New Jersey (1 Revision of 1877, ch. 85, sec. 27, p. 575); Delaware (Rev. Sts. 1874, ch. 120, sec. 5); Illinois (2 Rev. Sts. 1877, ch. 80, secs. 2, 3); South Carolina (Gen. Sts. 1888, sec. 1808); Georgia (Code, 1882, secs. 4077 and 4081); Florida (Dig. 1881, ch. 137, sec. 15); Alabama (1 Code, 1886, sec. 3391); Mississippi (Rev. Code, 1880, sec. 1331); Wisconsin (Rev. Sts. 1878, secs. 2185, 2186); Minnesota (Gen. Sts. 1878); Iowa (Rev. Code, 1880, sec. 2012); Dakota (Code, 1883, sec. 1975, 1976); Missouri (1 Rev. Sts. 1879, sec. 3074); Arkansas (Dig. sec. 4165); and Province of New Brunswick (Cons. Sts. ch. 83, sec. 17.

Decisions. — This is a penal statute, and is to be construed strictly (*t*). It does not extend to weekly tenancies (*u*); nor, as it seems, to a tenancy from quarter to quarter (*x*). One tenant in common may maintain an action for the double value of his moiety (*y*). But tenants in common cannot sue jointly for double value for holding over unless there has been a joint demise (*z*). An action for double value cannot be maintained by husband *and wife* when the tenant holds over the wife's land after the expiration of a term therein granted by the husband alone (*a*). The administratrix of an executor cannot sue for the double value of lands demised by the testator and held over by the defendant; but must obtain letters of administration de bonis non, even though the tenant * has attorned to her (*b*). Only the landlord or lessor, or the assignee of the immediate reversion, can sue: not a tenant to whom a fresh lease has been granted to commence on the expiration of the defendant's tenancy (*c*).

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The tenant must hold over wilfully. — The tenant must *wilfully* hold over, i.e., contumaciously, and not merely by mistake, under a fair and reasonable claim of title (*d*). Whether his claim to hold over be bonâ fide or a mere pretence is a question for the jury: a claim to hold over by virtue of a custom of the country, which does not apply to the demised premises, will not protect the tenant from liability to double value (*e*). Where a tenant held over possession during a treaty for a further term, which went off, Lord Mansfield held that the penalty in the statute did not apply (*f*). Where one of several tenants wilfully holds

(*t*) Lloyd *v.* Rosbee, 2 Camp. 453; Robinson *v.* Learoyd, 7 M. & W. 54.

(*u*) Lloyd *v.* Rosbee, 2 Camp. 453; Sullivan *v.* Bishop, 2 C. & P. 359.

(*x*) Sullivan *v.* Bishop, 2 C. & P. 359; Wilkinson *v.* Hall, 3 Bing. N. C. 508.

(*y*) Cutting *v.* Derby, 2 W. Blac. 1077; Wilkinson *v.* Hall, *supra*.

(*z*) Wilkinson *v.* Hall, 1 Bing. N. C. 713; Cole Ejec. 647.

(*a*) Harcourt *v.* Wyman, 3 Exch. 817.

(*b*) Tingrey *v.* Brown, 1 Bos. & P. 310.

(*c*) Blatchford, app., Cole, resp., 5 C. B., N. S. 524.

(*d*) Wright *v.* Smith, 5 Esp. 203; Soulsby *v.* Neving, 9 East, 313; Poole *v.* Warren, 8 A. & E. 582; Swinfen *v.* Bacon, 6 H. & N. 184, 846; 30 L. J., Ex. 33.

(*e*) Hirst *v.* Horn, 6 M. & W. 393.

(*f*) Anon., 5 Esp. 215.

over without the assent of his co-tenants, the latter will not be liable (*g*); nor is a tenant liable for the holding over by a sub-tenant without his assent (*h*). Where husband and wife hold over after notice given to the wife before her marriage, the husband may be sued alone for double value (*i*).

Demand and notice in writing. — There must be a "demand made and notice in writing given" pursuant to the act (*k*). The notice and demand may be served before the expiration of the term requiring the tenant to deliver up possession on the expiration of his term (*l*); and in such case no further demand or notice is necessary after the expiration of the term; and the double value should be calculated from the expiration of the term for so long as the tenant holds over (*m*). Or the demand and notice may be given within a reasonable time after the expiration of the term (the sooner the better), provided the landlord has done no act in the meantime to acknowledge the continuance of the tenancy, or rather to create a new one; and he will thereupon be entitled to double value calculated from the time of such demand, and not from the expiration of the tenancy (*n*). If the rent was before reserved quarterly and such demand is made in the middle of a quarter, the landlord cannot recover any rent or compensation for use and occupation for the antecedent fraction of such quarter (*n*). The demand and notice should always be given before, or as soon as possible after, the
* expiration of the term. Where the tenancy was only [*747]
from year to year, the usual written notice to quit is a sufficient demand and notice whereby to satisfy the statute, and no further demand or notice need be made after the tenancy has ceased (*o*). But the notice must amount to a valid and binding notice to quit (*p*). If it requires the tenant to

(*g*) Draper *v.* Crofts, 15 M. & W. 166.

(*h*) Rands *v.* Clark, 19 W. R. 48.

(*i*) Lake *v.* Smith, 1 B. & P. 174.

(*k*) See Form, Appendix C., No. 11, *post*.

(*l*) Messenger *v.* Armstrong, 1 T. R. 53; Wilkinson *v.* Colley, 5 Burr. 2694; Cutting *v.* Derby, 2 W. Blac. 1075.

(*m*) Id.; Soulsby *v.* Neving, 9 East, 310; Wright *v.* Smith, 5 Esp. 203; Booth *v.* Macfarlane, 1 B. & Adol. 904.

(*n*) Cobb *v.* Stokes, 8 East, 358.

(*o*) Wilkinson *v.* Colley, 5 Burr. 2694, 2698; Cutting *v.* Derby, 2 W. Blac. 1075; Hirst *v.* Horn, 6 M. & W. 393.

(*p*) Johnstone *v.* Hudlestone, 4 B. & C. 922.

quit on the wrong day, or on the right day at twelve o'clock *at noon*, that is not sufficient (*q*). A notice requiring the tenant to quit on the proper day "or I shall insist on double rent" (instead of double value) is sufficient, and does not give the tenant the option of holding over (*r*). A second notice, given after the expiration of the term, to quit on a subsequent day or to pay double rent, is no waiver of the first notice given before the expiration of the term, or of the double rent which had accrued under it (*s*). A notice to quit lands on a given day, "or at such time as your holding shall expire next after the expiration of half a year from the receipt of this notice," is sufficient in an action for double value (*t*). Where a sufficient notice to quit is given to a female tenant, and she afterwards marries, no further notice need be given to the husband to support an action against him for double value for holding over (*u*). A receiver or agent authorized to let, and to sue or distrain for rent, has sufficient authority to give the notice (*x*), as also has a receiver appointed in the High Court, with the usual powers, who may give the notice in his own name (*y*).

Double value cannot be distrained for. — Double value cannot be distrained for, it not being in the nature of rent, but of unliquidated damages, recoverable only by action pursuant to the statute. After recovering the possession of demised premises by an ejectment, the landlord may recover double value for the time the tenant held over after the expiration of the notice to quit until possession was obtained in the ejectment (*z*). The action for double value "has no reference to any antecedent remedy which the landlord had to recover possession by ejectment, but is cumulative. The two actions are brought *diverso intuitu;* the ejectment is in order to get possession of the premises wrongfully withheld;

(*q*) Page *v.* More, 15 Q. B. 684.

(*r*) Doe *d.* Matthews *v.* Jackson, 1 Doug. 175; Doe *d.* Lyster *v.* Goldwin, 2 Q. B. 143; Cole Ejec. 646.

(*s*) Messenger *v.* Armstrong, 1 T. R. 53, 54.

(*t*) Hirst *v.* Horn, 6 M. & W. 393.

(*u*) Lake *v.* Smith, 1 B. & P. New R. 174.

(*x*) Poole *v.* Warren, 8 A. & E. 582.

(*y*) Wilkinson *v.* Colley, 5 Burr. 2694; and see Trent *v.* Hunt, 9 Exch. 14.

(*z*) Soulsby *v.* Neving, 9 East, 310.

the action of debt for the double value is in order to indemnify the landlord for the wrong" (*a*). No previous action of ejectment is *necessary* to entitle the landlord to recover double value (*b*). The * action "stands in the [*748] place of an ejectment, but is more beneficial and effectual" (*c*). It is to be observed that when the landlord gives notice the penalty is double the yearly *value*; not double the yearly rent, which might not in some cases be an adequate satisfaction (*d*). In estimating the double value, the value of power supplied by the owner of a mill by means of a revolving shaft, and let together with a room in the mill, cannot be included, such power not being "lands, tenements, or hereditaments" (*e*).

Action in County Court. — An action for double value not exceeding 50*l.* may be brought in the County Court (*f*), and the defendant cannot oust the jurisdiction by alleging title to the premises in himself, if it be proved that he has admitted himself to have been tenant to the plaintiff at the times when the rent accrued, and from which the holding over commenced (*g*). It is not a dividing of the cause of action within the meaning of the County Courts Act (9 & 10 Vict. c. 95), s. 63, to levy one plaint for rent of premises and another for double value for holding them over, the two demands constituting distinct causes of action (*h*).

(c) *Double Rent after Tenant's Notice.*

Action for Holding over. — By 11 Geo. 2, c. 19, s. 18, "in case any *tenant or tenants shall give notice* of his, her or their intention to quit the premises by him, her or them holden, at a time mentioned in such notice, and shall not accordingly deliver up the possession thereof at the time in such notice contained, then the said tenant or tenants, his, her or their executors or administrators, shall from thenceforward pay to

(*a*) Id. 314.
(*b*) Cole Ejec. 645.
(*c*) Cutting *v.* Derby, 2 W. Blac. 1077.
(*d*) Soulsby *v.* Neving, 9 East, 313.
(*e*) Robinson *v.* Learoyd, 7 M. & W. 48.
(*f*) Blatchford, app., Cole, resp., 5 C. B., N. S. 514.
(*g*) Wickham *v.* Lee, 12 Q. B. 521.
(*h*) Id.; Ryal *v.* Rich, 10 East, 48.

the landlord or landlords, lessor or lessors, *double the rent* or sum which he, she or they should otherwise have paid, to be levied, sued for and recovered at the same time and in the same manner as the single rent or sum before the giving such notice could be levied, sued for or recovered; and such double rent or sum shall continue to be paid *during all the time such tenant or tenants shall continue in possession as aforesaid.*"

To what cases the statute applies. — It seems that the tenant need not hold over *wilfully or contumaciously* to render himself liable to double rent, there being no such words in the act, although it is otherwise with respect to "double value" (*i*). The statute only applies to those cases where the tenant has the power of determining his tenancy by a notice; and where he has actually given a valid notice [*749] sufficient to determine such tenancy (*k*). Unlike * the act 4 Geo. 2, c. 28, s. 1, which, as we have seen, applies to tenants for lives or years only, this statute seems to apply to all kinds of tenancies, and has been held to apply to parol demises from year to year (*l*). If a tenant from year to year gives his landlord notice that he will quit upon a contingency, e.g. "as soon as he gains another situation," and do not quit when the contingency happens, he is not liable to an action on the statute for double rent (*m*). The notice to quit mentioned in the statute need not necessarily be in writing; a parol notice is sufficient to enable the landlord to recover double rent (*n*). A tenant who has given notice and paid double rent may quit at any time without fresh notice, and thereupon his liability to double rent will cease (*o*).

Waiver of the right to double rent. — The acceptance of single rent, which has accrued due subsequently to the

(*i*) *Ante*, 745.

(*k*) Johnstone *v.* Hudlestone, 4 B. & C. 922.

(*l*) Timmins *v.* Rowlinson, 3 Burr. 1607; 1 W. Blac. 533; Sullivan *v.* Bishop, 2 C. & P. 359, in which the act was ruled not to apply to a weekly tenancy, appears to have proceeded upon a mistaken view of Lloyd *v.* Rosbee, 2 Camp. 453, and *ante*, 745 (*u*).

(*m*) Farrance *v.* Elkington, 2 Camp. 591.

(*n*) Timmins *v.* Rowlinson, 3 Burr. 1607; 1 W. Blac. 533; Johnstone *v.* Hudlestone, 4 B. & C. 922.

(*o*) Booth *v.* Macfarlane, 1 B. & Adol. 904.

notice, is, it seems, a waiver of the landlord's right to double rent, although it does not necessarily imply that the tenancy should continue (*p*).

Proceedings for double rent. — By the above statute the double rent may be levied, sued for and recovered, at the same times and in the same manner as the single rent might have been levied, sued for and recovered before the giving of such notice. The mode of proceeding, therefore, to recover double rent under the statute, is by distress (*q*), or by action at law. Such action may sometimes be brought in the County Court, where the sum claimed does not exceed 50*l.* (*r*).

Sect. 3. — *Emblements.*

(a) *Nature of Emblements.*

What are emblements. — The word "emblements" means a right given by law in certain cases to the tenant of an estate of uncertain duration, which has unexpectedly determined, without any fault of such tenant, to take the crops growing upon the land when his estate determines, although the estate itself has ceased (*s*).[1] It is derived from the French

(*p*) Doe *d.* Cheney *v.* Batten, Cowp. 243.

(*q*) Humberston *v.* Dubois, 10 M. & W. 765; 2 Dowl. N. S. 506; Timmins *v.* Rowlinson and Johnstone *v.* Hudlestone, *supra*; Cole Ejec. 649.

(*r*) Wickham *v.* Lee, 12 Q. B. 521.

(*s*) Smith L. & T. 339 (2nd ed.).

[1] **Emblements.** — A tenant at will, whose tenancy has been terminated without fault of his, is entitled to emblements. Towne *v.* Bowers, 81 Mo. 491; Stewart *v.* Doughty, 9 Johns. (N. Y.) 108; Rising *v.* Stannard, 17 Mass. 282, 287 (*per* Wilde, J.); Ellis *v.* Paige, 1 Pick. (Mass.) 43, 49 (*per* Wilde, J.); Davis *v.* Thompson, 13 Me. 209, 215; Sherburne *v.* Jones, 20 Id. 70; Sornbergger *v.* Berggren, 20 Neb. 399; Delaney *v.* Root, 99 Mass. 546; Brown *v.* Thurston, 56 Me. 126; Davis *v.* Brocklebank, 9 N. H. 72.

A lessee of a tenant for life is entitled to emblements. King *v.* Fosque, 91 N. C. 116, 119; Gee *v.* Young, 1 Hayw. (N. C.) 17; Poindexter *v.* Blackburn, 1 Ired. Eq. (N. C.) 286.

A tenant at will, who himself terminates the tenancy before harvest, is not entitled to the emblements. Chandler *v.* Thurston, 10 Pick. (Mass.) 205; De Bow *v.* Titus, 10 N. J. L. 128.

A tenant for a time certain is not entitled to emblements. Whitemarsh *v.* Cutting, 10 Johns. (N. Y.) 360; Chesley *v.* Welch, 37 Me. 106.

emblavence de bled (corn sprung or put up above [*750] ground), and strictly * signifies the growing crops of sown land; but the doctrine of emblements extends not only to corn sown, but to roots planted, and other *annual* artificial profits (*t*). The growing crops of those vegetable productions of the soil which are *annually produced by the labour of the cultivator* are emblements (*u*).

Teazles. — Fruit-trees, therefore, or oak, elm, ash or other trees, cannot be comprehended under emblements (*x*); but there may be a right of emblements in teazles (*y*). Where there is a right to take emblements, they belong either to the tenant himself, whose estate is determined in such a manner as to give him the right; to his grantee or devisee, where he has granted or devised them; or to his personal representatives, where the right arises upon the death of a tenant who has made no disposition respecting them (*z*).

Rights incident to emblements. — Where there is a right to emblements, ingress, egress and regress are allowed by law to enable the party to enter, cut and carry them away after the estate is determined (*a*):[1] so if a party who is entitled to emblements grant them to another, the grantee may cut and take them away after the death of the grantor (*b*). The

(*t*) Latham *v.* Attwood, Cro. Car. 515; Co. Lit. 55 b, note (1).
(*u*) Smith L. & T. 348 (2nd ed.).
(*x*) Co. Lit. 55 b; Com. Dig. Biens (G. 1); 1 Wms. Exors. 632 (6th ed.).
(*y*) Kingsbury *v.* Collins, 4 Bing. 202.
(*z*) 2 Blac. Com. 404.
(*a*) Co. Lit. 56 a; Hayling *v.* Okey, 8 Exch. 531, 545; Smith L. & T. 349 (2nd ed.).
(*b*) Shep. Touch. 244.

A disseizor or trespasser is of course not entitled to the crops, even though he have raised them. Thomas *v.* Moody, 11 Me. 139.

In Wheeler *v.* Kirkendall, 67 Iowa, 612, it was held that the lessee of an execution debtor was not entitled to emblements after expiration of the equity of redemption.

[1] **Ingress and egress.** — A tenant at will, whose tenancy has been unexpectedly terminated without his fault, has, at common law, the right of ingress and egress for a reasonable time to remove his family, furniture, fixtures, &c., and to harvest his crops (Brown *v.* Thurston, 56 Me. 126; Davis *v.* Brocklebank, 9 N. H. 72; Moore *v.* Boyd, 24 Me. 242; Davis *v.* Thompson, 13 Id. 209, 215 (*per* Weston, C. J.); Ellis *v.* Paige, 1 Pick. (Mass.) 43 (*per* Wilde, J.)); or he may surrender, reserving right to return and gather crop (Stewart *v.* Doughty, 9 Johns. (N. Y.) 108, 112; Towne *v.* Bower, 81 Mo. 491); and he may maintain trespass against the lessor if he interfere with his right (Stewart *v.* Doughty, *supra;* Rising *v.* Stannard, 17 Mass. 282).

right to emblements does not, however, give a title to the exclusive occupation of the land; therefore it seems that if the executors occupy till the corn or other produce be ripe, the landlord may maintain an action for the use and occupation of the land (*c*).

(b) *Prolongation of Term instead of Emblements.*

Agricultural tenant of landlord having uncertain interest may occupy till end of current year of tenancy. — The right to emblements is practically almost abolished by an act passed in 1851 (14 & 15 Vict. c. 25), which substitutes for claims to emblements the right of continued occupation. By sect. 1, "where the lease or tenancy of any farm or lands held by a *tenant at rack-rent* (*d*) shall determine by the death or cessor of the estate of any landlord entitled for his life, or for any other uncertain interest, *instead of claims to emblements*, the tenant shall continue to hold and occupy such farm or lands *until the expiration of the then current year of his tenancy*, and shall then quit, upon the terms of his lease or holding, in the same manner as if such lease or tenancy were then determined by efflluxion of time or other lawful means during the continuance of his landlord's estate; and the succeeding landlord or owner shall be entitled to recover and receive of the tenant in the *same manner as his [*751] predecessor or such tenant's lessor could have done if he had been living or had continued the landlord or lessor a fair proportion of the rent for the period which may have elapsed from the day of the death or cessor of the estate of such predecessor or lessor to the time of the tenant so quitting, and the succeeding landlord or owner and the tenant respectively shall, as between themselves and as against each other, be entitled to all the benefits and advantages, and be subject to the terms, conditions and restrictions to which the preceding landlord or lessor and such tenant respectively would have been entitled and subject in case the lease or ten-

(*c*) Plowden's Queries, No. 239; 1 Wms. Exors. 679 (6th ed.); Chamb. L. & T. 340.

(*d*) That is, a rent of the full annual value, or near it.

ancy had determined in manner aforesaid at the expiration of such current year; provided always, that no notice to quit shall be necessary or required by or from either party to determine any such holding and occupation as aforesaid." This enactment applies only to those tenants *at rack-rent* who before the statute would have been entitled to emblements (*e*); and seems to include all such persons except those who are tenants for their own lives, or the life of another — in which cases the executors of such persons have still a right to emblements. But it applies to all such tenancies in which there might have been a claim to emblements, ex. gr. a tenancy from year to year of a cottage with about an acre of land, cultivated as a garden, and partly sown with corn, and planted with potatoes (*f*). The succeeding owner may after the expiration of the current year of the tenancy distrain for his proportion of the rent (*f*).

(c) *Who entitled to Emblements.*

General rule as to persons entitled to emblements. — Those only are entitled to emblements who are not within the act 14 & 15 Vict. c. 25, s. 1, above set forth, and have an uncertain estate or interest in land, which is determined, either by the act of God or of the law, between the period of sowing and the severance of the crop (*g*). If the estate, although uncertain in its nature, be determined by the tenant's own act — as by forfeiture for waste committed, or by marriage of a female tenant who held during widowhood — the claim to emblements never arises (*h*); nor does it as against a lessor who enters for a condition broken, or by title paramount (*i*). And where a lease was granted with a condition for re-entry in case of the tenant contracting a debt upon which judgment and execution should issue, it was held that the con-
[*752] dition was broken, and the *emblements lost to the tenant, by execution issuing, although it was argued

(*e*) Ld. Stradbrooke *v.* Malchy, 2 Ir. Rep. N. S. 406.

(*f*) Haines *v.* Welch, L. R., 4 C. P. 91; 38 L. J., C. P., 118.

(*g*) Smith L. & T. 339 (2nd ed.).

(*h*) Oland's case, 5 W. R. 116; Bulwer *v.* Bulwer, 2 B. & A. 470.

(*i*) Nicholas *v.* Simonds, 2 Roll. R. 468; Bulwer *v.* Bulwer, 2 B. & A. 471; Johns *v.* Whitley, 3 Wils. 127.

that a tenant under such a condition would be led to cultivate after contracting a debt, because it would never be certain whether the debt would be followed by execution, which was partly the act of the law (*k*).

Tenants for life and their subtenants. — Tenants for life, whether for their own lives or pur autre vie, are strictly within the rule applicable to persons entitled to emblements (*l*). The same rule applied to the subtenants or lessees of tenants for life before the above act, and they had not only the same privileges respecting emblements, but in some instances greater; for in those cases where the tenant for life should not have emblements because the estate was determined by his own act, it should not prejudice his subtenant, who could not be answerable for it, and he had, therefore, a right to emblements (*m*).

Clergymen and their subtenants. — The parochial clergy are entitled to emblements (*n*): but a parson who resigns his living is not entitled to emblements, although his lessees and subtenants are (*o*).

Tenants from year to year. — Tenants from year to year seem to be entitled to emblements (*p*), although not entitled to a prolongation of their term under 14 & 15 Vict. c. 25, s. 1, except where their tenancy is determined by the death of their landlord or the happening of some other uncertain event over which they have no control (*q*).

Strict tenants at will. — A strict tenant at will is entitled to emblements where his estate is determined either by his own death or by the act of the landlord: but not to cases where the tenant has himself determined the will (*r*).

Tenants under execution. — Tenants under execution — as under extent (*s*), or elegit — are entitled to emblements.

(*k*) Davis *v.* Eyton, 7 Bing. 154.

(*l*) Co. Lit. 55 b.

(*m*) Knevett *v.* Poole, Cro. Eliz. 463; Bulwer *v.* Bulwer, 2 B. & A. 470.

(*n*) 28 Hen. 8, c. 11, s. 6.

(*o*) Bulwer *v.* Bulwer, 2 B. & A. 470.

(*p*) Kingsbury *v.* Collins, 4 Bing. 207.

(*q*) Kingsbury *v.* Collins, 4 Bing. 207; Haines *v.* Welch, L. R., 4 C. P. 91.

(*r*) Co. Lit. 55 b; Kingsbury *v.* Collins, *supra*; Smith L. & T. 342 (2nd ed.).

(*s*) Barden's case, 2 Leon. 54.

where the tenancy is put an end to by the judgment being satisfied.

Sect. 4. — *Outgoing and Incoming Tenants.*[1]

(a) *Rights of the Parties Generally.*

At common law a tenant who knows when his tenancy will end (whether he be a tenant for years, or a tenant from year to year, having received due notice to quit) has no [*753] rights on or out of the land * at the end of his tenancy (*t*). But this rule (which may, of course, be modified by agreement) the common law allows to be modified by custom, by what is called, in relation to agricultural holdings, the "custom of the country."

Variety of customs. — The customs of the country, as we shall see presently, vary in respect of place, and change in respect of time to a very remarkable degree. Nor are they always for the benefit of agriculture. In forward districts, they will be found to move with the times, or to be superseded by special agreements; but in backward districts this is often not the case. However this may be, the object of all customs of the country applicable to the end of the tenancy is to extend the doctrine of emblements, and to allow him who sows to reap. With this object, the outgoing tenant is allowed to occupy his farm — for periods and under limitations infinitely varying in extent — after the expiration of his tenancy: to re-enter and carry away crops: and to receive compensation for "unexhausted improvements."

Custom must be proved as a fact. — Every custom of the country must be proved as a fact by the party setting it up (*u*). It need not have existed from time immemorial (*x*): a common usage of the neighbourhood is sufficient.

(*t*) Wigglesworth *v.* Dallison, 1 Sm. L. C. See Caldecott *v.* Smythies, 7 C. & P. 808, *per* Parke, B.

(*u*) Caldecott *v.* Smythies, 7 C. & P. 808.

(*x*) Senior *v.* Armytage, Holt N. P. 197; Leigh *v.* Hewitt, 4 East, 160; Dalby *v.* Hirst, 1 B. & B. 224.

[1] See *ante*, sec. 3 (*a*), notes, "Emblements" and "Ingress and Egress."

Custom incorporated in contract of tenancy. — The landlord and tenant are presumed to have contracted with reference to the custom, and the custom is incorporated into the contract, whether oral, in writing, or by deed, unless the custom and the terms of the contract are expressly or impliedly inconsistent with it. This rule was laid down in the leading case of Wigglesworth *v.* Dallison (*y*), in which case a tenant under a lease by deed was held entitled to a way-going crop, and may be found fully expounded in Hutton *v.* Warren (*z*), in which case a custom to receive a reasonable allowance for seed and labour bestowed on arable land in the last year of the tenancy, and to leave the manure for the landlord if he would purchase it, was held not to be excluded by a stipulation for the consumption of three-fourths of the hay and straw on the farm.

Remedy of outgoing tenant. — In practice there is generally a sale of growing crops, &c., by the outgoing to the incoming tenant, and such a sale is within the Statute of Frauds, sect. 4, so as to require to be in writing (*a*), and can of course be recovered upon in an action by the outgoing against the incoming tenant (*b*). But it is clear from Faviell *v.* Gaskoin (*c*) that the outgoing tenant has, where a custom to be paid for tillages, &c., exists, an absolute right to be paid by the landlord, and not merely a *right con- [*754] ditional on there being an incoming tenant. Moreover, a custom that the outgoing tenant shall look to the incoming tenant, to the exclusion of the landlord's liability, cannot be supported in law, such a custom being unreasonable, uncertain, and prejudicial to the interests both of landlords and tenants (*d*). A case may arise however in which the outgoing tenant has agreed to accept the incoming tenant

(*y*) 1 Doug. 201; 1 Sm. L. C.

(*z*) Hutton *v.* Warren, 1 M. & W. 466. For cases where the custom was held excluded on the ground of the contract of tenancy being inconsistent with it, see Roberts *v.* Barker, 1 Cr. & M. 808; Clarke *v.* Royston, 13 M. & W. 752.

(*a*) Earl of Falmouth *v.* Thomas, 1 Cr. & M. 82; Harvey *v.* Grabham, 5 A. & E. 61.

(*b*) Tanner *v.* Washbourne, 1 F. & F. 330.

(*c*) Faviell *v.* Gaskoin, 7 Exch. 273; 21 L. J. Ex. 85.

(*d*) Bradburn *v.* Foley, L. R., 3 C. P. D. 129; 47 L. J., C. P. 331; 38 L. T. 421; 26 W. R. 423.

as his debtor for the amount due, instead of the landlord (*e*).

Remedy against original landlord's real representative. — In the case of the landlord's death, the tenant's remedy is against his real representative for the time being. In Mansel *v.* Norton (*f*) the original landlord demised a farm for a term of years which had not expired at his death. The tenant for life under his will paid the tenant for his tenant-right at the expiration of the term, and it was held that he could not recover the amount paid, either from the trustees of a term of 1000 years or from the remaindermen; Jessel, M.R., observing that if the tenant for life lived long enough, he would get back the outlay from an incoming tenant, but if not, he would only suffer the hardship which occurs in every case where a tenant for life, who has incurred expense for the benefit of the estate, does not live long enough to get the benefit of it.

Right of landlord to rent out of valuation. — In Stafford *v.* Gardner (*g*) the plaintiff was outgoing and the defendant incoming tenant. A valuation of tillages was made as between them with the consent of the landlord. The plaintiff owing rent to an amount exceeding that found to be due to him on the valuation, the landlord gave notice to the defendant to pay the amount of the valuation to himself, and not to the plaintiff, which the defendant did. It was held that the plaintiff could not recover the amount of the tillages from the defendant, inasmuch as the contract to be implied between them was subject to the right of the landlord to be paid the arrears of rent out of the valuation.

(b) *Partial Occupation.*

Occupation of part, after tenancy ended. — It is very generally the case, that by the terms of the lease or the custom of

(*e*) See as to this question, which is one of fact, Codd *v.* Brown, 15 L. T. 536.

(*f*) Mansel *v.* Norton, L. R. 22 Ch. D. 769; 52 L. J. Ch. 357; 48 L. T. 654; 31 W. R. 325, C. A. Whether there was a tenancy from year to year or under a lease, and whether the payment was by custom or express contract appears doubtful, but immaterial. As to the effect of the Settled Land Act, see p. 9, *ante*.

(*g*) L. R., 7 C. P. 242; 25 L. T. 876; 20 W. R. 899.

the country, outgoing tenants of farms leave, and incoming tenants enter upon, the premises at different periods of the year; as the house and buildings at one time, the arable land at another, and the pasture and meadow land at a third. Sometimes, however, the general quitting of the farm takes place at one time; and there exists the privilege for the outgoing tenant to retain possession of the land upon which his away-going crops are growing, * and the use [*755] of some of the barns and stables for the purpose of threshing and conveying them to market. This privilege is occasionally given on condition of his paying the rent and taxes applicable to the premises which he retains; but, perhaps, more commonly without any such stipulation. The incoming tenant has sometimes also the privilege of entering before the expiration of the existing tenancy, for the purpose of ploughing and preparing for his crops; particularly where there is a Lady-day holding. A custom that the tenant should hold over for half a year after the expiration of his term is bad (*h*); but a custom to take an away-going crop, and house the same in the barns of the farm for a certain time after he has quitted possession of the bulk of the farm, is good (*i*). A stipulation on the occasion of a weekly letting that after the expiration of the tenancy by the usual week's notice the tenant shall have a reasonable time to remove his goods has been held valid (*k*).

Rights to retain possession operates as prolongation of term. — Where by the custom of the country, or by the terms of the lease, the tenant has a right to retain possession of any part of the demised premises after the end of the term, ex. gr. a right to retain the barns for the purpose of threshing out his crops, &c., such right will in effect *operate as a prolongation of the term as to such part*: and therefore during that period the landlord may distrain (*l*). For a like reason the outgoing tenant, or his assignees, may maintain tres-

(*h*) White *v.* Sayer, Palm. 211.

(*i*) Wigglesworth *v.* Dallison, 1 Doug. 201; 1 Smith L. C. 598 (7th ed.); Beavan *v.* Delahay, 1 H. Blac. 5; Boraston *v.* Green, 16 East, 71.

(*k*) Cornish *v.* Stubbs, L. R., 5 C. P. 334; 39 L. J., C. P. 202.

(*l*) Beavan *v.* Delahay, 1 H. Blac. 5; Knight *v.* Bennett, 3 Bing. 364.

pass (*m*), or defend an action of trespass at the suit of the incoming tenant (*n*), or defend an action of ejectment at the suit of the landlord (confining his defence by notice to the particular part) (*o*), and cannot remove any of the straw, &c., which he has convenanted not to remove "during the leased term" (*p*). So, where there is a right reserved to the tenant to take the away-going crop, it operates as a prolongation of the term on which such crop grows, and the possession of the land continues in the tenant till the crop is or might be cut and carried away (*q*).

The following Table, made up from the information supplied by the schedules to the Report of the Central Associated Chambers of Agriculture, upon Agricultural Customs (*r*), shows the "custom of the country" as regards partial occupation existing in certain districts in 1874:—

Berkshire . . . . (Newbury).	"Usual" for incoming tenant to enter upon the fallows intended for roots on the previous Lady-day.
* **Cambridgeshire** . (North of Isle of Ely).	Outgoing tenant retains possession of [*756] barns and stockyard, for a reasonable time, to thresh and market corn.
Cheshire . . . . (Nantwich).	Custom allows incoming tenant to take possession of the meadow land on December 29th preceding Lady-day, and of the land on February 2nd, except one field called an outlet, and the barn and buildings. Possession of this field and of house and premises is given on May 1st. Retainer of possession by outgoing tenant not permitted.
Cheshire . . . . (Northwich).	Outgoing tenant may retain house and buildings and one grass field to February 2nd; arable to November 1st.
Cheshire . . . . (Macclesfield).	Incoming tenant takes possession of all the land on February 2nd, except an outlet for cattle. Outgoing tenant retains house, buildings and outlet till May 1st.

(*m*) Beaty *v.* Gibbons, 16 East, 116.

(*n*) Griffiths *v.* Puleston, 13 M. & W. 358.

(*o*) Alcock *v.* Wilshaw, 2 E. & E. 633; 29 L. J., Q. B. 143.

(*p*) Earl of St. Germains *v.* Willan, 2 B. & C. 216.

(*q*) Boraston *v.* Green, 16 East, 81; Griffiths *v.* Puleston, *supra*.

(*r*) See further as to this Report, 765, *post*.

Cheshire (Middlewich, &c.).	Incoming tenant enters on the land, except an outlet for cattle, on February 2nd. Outgoing tenant retains possession of the premises and outlet till 1st or 12th May.
Cheshire (North)	Outgoing tenant retains house, outbuildings and outlet till May 12th.
Derbyshire	Incoming tenant prepares the land for spring crops, and is allowed room on the farm for housing his horses and servants. On many estates outgoing tenant claims to hold to the 6th April in lieu of the 25th March.
Dorsetshire (Blandford).	Incoming tenant allowed to enter to prepare for roots and green crops. Outgoing tenant allowed the use of barns for threshing and yards for feeding hay, straw, &c., in Michaelmas entries till the following April 1st.
Dorsetshire (Central)	A Lady-day tenant sometimes takes possession of a portion of the water meadows in January or February, to commence irrigating them. A Michaelmas tenant will have liberty to enter on the land for wheat in July or August, so as to haul out dung and get his ploughing done in good season. An outgoing Lady-day tenant, having an outgoing crop, will hold the ewe leases till July 1st, all the arable land under corn till October 10th, and barns, yards, part of the stables, and the whole or part of the farm-house till July 6th in the following year; also some of the cottages.
Dorsetshire (Blackmoor).	Incoming tenant enters in May to put in his turnip crop: in some cases rent being allowed, but in most cases not anything. Outgoing tenant in most cases retains the use of the yards, sheds, barns and part of the dwelling-house for six months after the Michaelmas term.
***Durham**	Incoming tenant enters May 13th; but [*757] he is empowered, six months previously, to plough all such lands as he is entitled to as incoming lands. Incoming tenant also entitled to all manure made upon the premises for six months previously, and to sow grass seeds among the corn of outgoing tenant. Outgoing tenant entitled to sow half the tillage land and to retain possession till the harvest following, and the joint occupation of

	the barn and stackyard for the purpose of threshing his outgoing crops.
Gloucestershire (Dean Forest).	Principally Lady-day takings. Outgoing tenant has a right to a fold room to consume the straw, and in some instances a right to two rooms in the farm-house till the May following the expiration of the tenancy.
Gloucestershire (Stow-on-the-Wold).	Incoming tenant enters at Candlemas, to prepare the spring corn, on a Lady-day entry; and early in August, to commence ploughing the clover ley on a Michaelmas entry. Outgoing tenant remains to May 1st, for the purpose of spending the fodder.
Gloucestershire (Cotswold Hills).	Incoming tenant enters, in case of Michaelmas entry, about August 20th to prepare for wheat crop. Outgoing tenant allowed to thresh out corn and consume fodder, when not taken to by incoming tenant, up to May 20th next after the expiration of the tenancy.
Gloucestershire (Cirencester).	No pre-entry by custom. In Lady-day entries outgoing tenant may remain about three months, and in Michaelmas entries about six months, retaining possession of a portion of the house, barns, stables, yards, &c., for threshing out corn crops, consuming hay, &c.
Gloucestershire (Tewkesbury).	Incoming tenant entitled to the whole of the pasture-land, one-fourth of the arable, and the dwelling-house (excepting two rooms) from the time his tenancy commences. Outgoing tenant retains possession of barn and yard room for spending the straw and keep, stable room for horses (according to the size of the farm) for hauling out the crop, and two rooms in the house for the lodging of a workman until the Lady-day following.
Gloucestershire (Vale of the Severn).	In Lady-day takes and sometimes in Michaelmas takes, incoming tenant prepares the fallows during the summer. "A Michaelmas tenant retains the house, yards and buildings, to consume his produce, if not taken by the incomer."
Gloucestershire (Tetbury).	No pre-entry. In a Michaelmas take outgoing tenant can retain barns and yards till the next Lady-day.
* **Gloucestershire** (East and North of Cheltenham).	In a Lady-day take incoming tenant enters upon all the lands and premises; [*758] but under a Michaelmas take he enters upon

	the old ley and fallows to prepare for wheat on August 1st, and on the wheat stubble immediately after the harvest to plough and prepare for root crops. In a Lady-day take outgoing tenant holds over barns, granary, yards, stable room for four horses and part of the dwelling-house up to May 1st, to thresh out the corn and consume the hay and straw; but on a Michaelmas take he quits on September 29th, but holds over the barn, granary, stabling, and part of the house, up to December 25th, to thresh out the corn only.
Gloucestershire (West of Cheltenham).	Outgoing tenant allowed yard room for the purpose of spending his fodder, straw and roots, barn room and rickyard room, and a portion of the farm-house. Each and all of these from Michaelmas to Lady-day.
Hampshire (North)	Incoming tenant may enter six months previous with portion of house and stabling. Outgoing tenant retains part of the house and stables, and the whole of the barns and yards, till the following June.
Hampshire (Andover).	Incoming tenant may enter March 25th to plough for white turnips; at Midsummer to sow turnips; in August to prepare for the wheat crop, or at such a time as outgoing tenant can get his previous green crops fed off. Outgoing tenant retains a convenient part of the house, and the whole of the barns for clearing out his corn until May.
Herefordshire	Candlemas and Lady-day entries admit of incoming tenant entering after November to plough stubble ground to prepare the same for Lent grain or turnip crop. "Custom permits outgoing tenant to keep the fold yards and buildings with one grass pasture, locally termed a 'boosey' pasture, till May 1st, and a barn and granary to thresh and protect his off-going crop of wheat. But all recent special agreements tend to break through this absurd custom."
Hertfordshire (West)	Nearly all Michaelmas entries. Incoming tenant generally enters at Lady-day to work the fallows; but if outgoing tenant does them he is paid for the actual labour performed. Out-

	going tenant mostly has to May 1st to thresh out and make off his crops.
Lancashire (South)	Incoming tenant may enter land February 2nd, house and buildings May 1st. Outgoing tenant has the house and buildings, with one pasture field, called an "outlet," to his use until May 1st, and is "also allowed to cut and take away straw and all his portion of wheat, which is one-half, when ready, if such has not been arranged previously."
* **Lincolnshire** . . .	Neither pre-entry nor retainer of possession permitted in any part of Lincolnshire. [*759]
Norfolk . . . . . (Marshland District).	On Michaelmas farms outgoing tenant retains possession of the barns and stockyard until May 1st.
Northamptonshire .	Outgoing tenant has use of premises for the consumption of produce.
Northamptonshire . (Weedon).	Outgoing tenant has use of premises until May 1st beyond Lady-day for consuming produce.
Northumberland . (Tynedale).	Incoming tenant may enter on or after February 2nd to plough land for fallow or green crops. Outgoing tenant has use of barn for his away-going crop (if not sold to incoming tenant) till May-day following.
Nottinghamshire .	Neither pre-entry nor retainer of possession permitted.
Oxfordshire and . . **Berkshire** (Henley-on-Thames District).	In some Michaelmas takes incoming tenant allowed to enter in February to work the fallows. Incoming tenant may enter, at least for wheat, the middle of August or 1st of September: for which he has stabling for his horses and lodging for his men. Lady-day tenants are generally allowed possession of a portion of the house, stables, and barns till early in June. Michaelmas tenants have the same indulgence till Lady-day following.
Shropshire	Incoming tenant may pre-enter to prepare stubbles, stabling for horses and room for servants being provided. In some parts of Shropshire there is no right of pre-entry. "The custom is becoming less acted upon than formerly; and arrangement is generally made with outgoing tenant to perform the necessary work at a price agreed upon." House generally re-

	tained, and a boosey pasture allowed, with a portion of the buildings, for outgoing tenant till May 1st. Outgoing tenant also allowed reasonable time for threshing his wheat, sometimes till February 2nd.
Staffordshire (Wolverhampton).	Incoming tenant may enter on February 1st, "tenant and man without payment." Outgoing tenant allowed a boosey pasture up to May 5th.
Staffordshire (South).	Pre-entry "irregular." Retainer of possession not permitted.
Suffolk (except South).	Entry on October 11th. Incoming tenant has to thresh, dress and deliver the corn of outgoing tenant.
Suffolk (South)	Incoming tenant may pre-enter only with consent of outgoing tenant, who has use of barn and granary up to Lady-day after quitting at Michaelmas.
***Surrey**	In Michaelmas tenancies outgoing tenant [*760] retains the use of the barns, a part of the granaries and cart sheds till the ensuing May-day.
Wiltshire	Incoming tenant may pre-enter to prepare for roots and fallow for wheat. In South Wiltshire custom allows outgoing tenant to retain possession of a proportion of the house, barns and buildings, for the purpose of threshing his corn and feeding the straw of the last year's corn crops.
Worcestershire	Incoming tenant may enter on February 2nd in a Lady-day take, and is allowed part of the buildings for his own use. Outgoing tenant has the use of part of house, with foldyard and boosey pasture, until May 1st.
Yorkshire (East Riding).	Incoming tenant may enter on February 1st for the purpose of ploughing, and stable room must be provided for horses.
Yorkshire (West Riding: Wakefield).	Incoming tenant may enter on February 2nd. Outgoing tenant may not retain possession after that day.
Yorkshire (West Riding: Barnsley).	Pre-entry not permitted. Most of the holdings from Candlemas for the land, and May 1st for the homesteads.

Yorkshire . . . . (North and West: Ripon).	Lady-day entry. Incoming tenant can enter at Martinmas upon all arable lands, except the fields on which outgoing tenant has his away-going crops. Outgoing tenant can retain possession of all the arable lands on which the away-going crops are growing, until such crops shall have been valued or harvested.

(c) *Away-going Crop.*

Right to an away-going crop. — It was held in Wigglesworth *v.* Dallison (*s*), that a custom that a tenant, whether by parol or deed, shall have the "way-going crop" after the expiration of his term, is good. Such a custom was said by Lord Mansfield, in 1799, to be for the benefit and encouragement of agriculture (*s*), but in modern times strong opinions have been entertained of the propriety of getting rid of it (*t*) chiefly on the ground that it may compel a man to carry on his business in two distinct places; and it has become a common custom for the incoming tenant to buy the standing crop at a valuation from the outgoing tenant, the winter corn crops being so valued where the entry is at Lady-
[*761] day, and the clover and root crops where the entry * is at Michaelmas. Where the lease contains no stipulations as to the mode of *quitting*, the off-going tenant is entitled to his away-going crop according to the custom, even though the terms of *holding* may be inconsistent with such a custom (*u*). The fact of the existence of the usage is to be collected not only from what is usually done in cases of tenancy from year to year, but from the usual course pursued where tenants hold under regular leases. The principle applies equally to the case of a tenancy from year to year as to a lease for a longer term, with respect to the right to take an away-going crop (*x*). Where a tenant held from Lady-day, and there was a custom that the tenant, at the regular expiration of a Lady-day tenancy, should have the away-

(*s*) 1 Doug. 201; 1 Smith L. C., *ante*, 753.

(*t*) Wingrove Cooke on Agricultural Tenancies, A.D. 1850, p. 120; New Edition, 1882, p. 153.

(*u*) Holding *v.* Pigott, 7 Bing. 465; Webb *v.* Plummer, 2 B. & A. 746; Hutton *v.* Warren, 1 M. & W. 466; Muncey *v.* Dennis, 1 H. & N. 216.

(*x*) Onslow *v.* ——, 16 Ves. 173.

going crops, and the tenancy was determined on the 1st of June by an award made on a reference of disputes between the landlord and tenant; it was held, that the custom had no operation (*y*).

Against whom outgoing tenant may claim right to an away-going crop. — Where the outgoing tenant is entitled to take an away-going crop, he may avail himself of that right, whether the farm revert back into the hands of his landlord (*z*), or an incoming tenant take possession (*a*). An agreement between the outgoing and incoming tenants with respect to crops does not affect any existing rights of the landlord (*b*). A clause in a lease that the tenant should be entitled to an away-going crop, which was to be left for the landlord or his incoming tenant at a valuation, has been held not to give the tenant the right of possession as against the landlord, after the determination of the tenancy, but at most only to go on the land for the purposes of an away-going crop, and not to exclude the landlord (*c*). A permission by a landlord to an outgoing tenant to sow more land than by the custom of the country he was entitled to on quitting, is good against the incoming tenant (*d*).

Remedies of the parties as to crops, &c. — Where an outgoing tenant has no right to an away-going crop, but cuts and carries away the corn after the expiration of his term, an action of trover may be maintained against him by the landlord (*e*), but not by the incoming tenant (*f*). Where there was an agreement between an outgoing and incoming tenant, that the latter should buy the hay, &c., of the former upon the farm, and that the former should allow to the latter the expenses of repairing the gates and fences of the farm, and that the value of the hay, &c., and of repairs should be settled by third persons, it was held, that the balance settled

(*y*) Thorpe *v.* Eyre, 1 A. & E. 926.

(*z*) Faviell *v.* Gaskoin, 7 Exch. 273; Mousley *v.* Ludlam, 21 L. J., Q. B. 64; 15 Jur. 1107.

(*a*) Muncey *v.* Dennis, 1 H. & N. 216.

(*b*) Petrie *v.* Daniel, 1 Smith R. 199.

(*c*) Strickland *v.* Maxwell, 2 Cr. & M. 539.

(*d*) Griffiths *v.* Tombs, 7 C. & P. 810.

(*e*) Davies *v.* Connop, 1 Price, 53.

(*f*) Boraston *v.* Green, 16 East, 71.

[*762] * to be due to the outgoing tenant for his hay, &c., after deducting the value of the repairs, might be recovered by him under a common count for goods sold and delivered, although he failed upon a special count on the agreement, for want of including in it that part of the agreement which related to the valuation of the repairs (*g*).

(d) *Straw, Hay and Manure.*

Where an outgoing tenant can claim remuneration. — In some cases contracts relative to the disposal of manure are entered into between the landlord and tenant which may give the latter, when he leaves the farm, a power of disposing of it to an incoming tenant (*h*). A tenant held under the terms of an expired lease, by which it was stipulated that, on quitting, the tenant should not sell or take away any of the manure in the fold, but should leave it to be expended on the land by the landlord or his succeeding tenant, but there was no provision for payment to the tenant: by the custom, the tenant was bound in the same way, but he would have been entitled to payment: it was held, that, as an express stipulation had been made on the subject, the custom was excluded, and that the tenant was not entitled to be paid for the manure (*i*). A lease containing no provisions as to straw unconsumed on quitting, is not inconsistent with a custom of the country that the tenant shall be paid for the straw and manure on leaving, and therefore the tenant is entitled to be paid for his straw (*k*). Where the tenant is entitled to be paid a fair price for the straw left, but nothing for the manure, he is only entitled to be paid for the straw at a fodder or "consuming" price, viz. one-half the market price (*l*). Where an outgoing tenant had contracted with his landlord to leave

(*g*) Leeds *v.* Burroughs, 12 East, 1.

(*h*) Legh *v.* Lillie, 6 H. & N. 165; 30 L. J., Ex. 25; Hurst *v.* Hurst, 4 Exch. 579; Massey *v.* Goodall, 17 Q. B. 310.

(*i*) Roberts *v.* Barker, 1 Cr. & M. 808; Webb *v.* Plummer, 2 B. & A. 746; Clarke *v.* Roystone, 13 M. & W. 752.

(*k*) Muncey *v.* Dennis, 1 H. & N. 216; 26 L. J., Ex. 66.

(*l*) Clarke *v.* Westrope, 18 C. B. 765; 25 L. J., C. P. 287.

the manure on the premises, and to sell it to the incoming tenant at a valuation; it was held, that it gave him a right of *on stand* for the manure on the farm; and that, possession and property remaining in him until the valuation was made, a removal or use of it by the incoming tenant before that was done would render him liable to an action of trespass by the outgoing tenant (*m*). Where a tenant, who was bound to bring back dung for all hay sold by him to be carried off the premises, at the time of his quitting sold a part of a rick then standing, to a purchaser, without mentioning his liability to bring back manure; it was held that the succeeding tenant had a right to refuse to permit the hay to be
*removed until the manure should be deposited (*n*). [*763] Where two parties entered into a written agreement, by which one was to take a farm of the other, and to take the straw, chaff, &c., at a valuation, to be made by such competent persons as the two parties should respectively appoint; it was held that such an agreement was entire, and that the two parts could not be separated; and that if one person only was by parol agreement afterwards appointed to make the valuation, an action could not be maintained on the parol agreement so substituted, even though the straw, chaff, &c., had been taken and used (*o*). Where in an action by an outgoing tenant against his landlord for the value of hay and straw left on the premises that the plaintiff held, subject to the terms of a draft lease, by which it was agreed, first, that the tenant was to consume the hay and straw on the premises, and not to sell it except as afterwards mentioned; secondly, that the tenant might sell his hay and wheat-straw (except the last year's), provided for each load he brought back two loads of dung, or equivalent manure on the lands; and thirdly, that all the hay and straw not used for fodder, arising from the last year's crop, should be left on the determination of the tenancy, the tenant being paid at a fair valuation; and the words "fair valuation" had been substituted in the draft for the words "consuming price;" the court held, without

(*m*) Beaty *v.* Gibbons, 16 East, 116.
(*n*) Smith *v.* Chance, 2 B. & A. 753.
(*o*) Harvey *v.* Grabham, 5 A. & E. 61.

considering the effect of the alteration in the draft, that the tenant was entitled to be paid according to a "fair valuation;" and that those words did not mean a "consuming price" (*p*). Where it is stipulated that no hay or straw shall be sold off the land during the term without the consent of the landlord or his agent, unless an equivalent in the shape of manure be returned on the land, it should be clearly expressed whether the market value or price of the straw is to be returned, or only so much manure as the straw would have made (*q*). A farm lease contained a covenant by the lessee that he "should not nor would *during the last year* of the term thereby granted sell or remove from the said farm and lands any of the hay, straw and fodder *which should arise and grow in the said farm and lands:*" it was held, that the prohibition was not restricted to hay, straw, and fodder which arose and grew on the farm in the last year of the term, but extended to that which had arisen and grown at any time during the term (*r*). Where the tenant agrees to pay an additional rent of 10*l.* for every ton of "hay, straw, or other dry fodder," of the growth of the premises which shall be sold off or taken away [*764] * or removed therefrom, such stipulation extends to hay of such bad quality as not to be fit for food for cattle (*s*).

(e) *Tillages.*

When outgoing tenant entitled to remuneration. — Arable land in some localities, especially where unsuited to the growth of turnips and other root crops, is fallowed at certain periods, in order not only that it may be cleansed of couch and other weeds, but that it may be refreshed, and the vegetative powers, which have been exhausted by cropping, restored. This process requires a considerable outlay of capital whilst the land is perfectly unproductive during the fallow season; but the benefit derived is considered to extend to a series of subsequent crops. It is desirable that the regular

(*p*) Cumberland *v.* Bowes, 15 C. B. 348; 24 L. J., C. P. 46.

(*q*) Lowndes *v.* Fountain, 11 Exch. 487; 25 L. J., Ex. 49.

(*r*) Gale *v.* Bates, 3 H. & C. 84; 33 L. J., Ex. 235.

(*s*) Fielden *v.* Tattersall, 7 L. T., N. S. 718, Exch.

rotation of fallowing upon a farm should be kept up, notwithstanding any change of the tenants; but it is not to be expected that a tenant should lay out capital in the process of fallowing, from which he cannot derive the complete benefit before his tenancy expires. From these circumstances has arisen the right which an outgoing tenant has to remuneration for tillage which is not exhausted at the time of his quitting. This usage has been held to be a valid and reasonable usage (*t*) for obvious reasons.

An agreement that an outgoing tenant shall be paid for tillages on the expiration of his tenancy is not inconsistent with the terms of a tenancy from year to year (*u*).

Where a farm was taken for fourteen years, and the tenant was to pay a given sum for tillages and improvements done before he entered, and to receive the value of such as he should leave; and in the first year he said he would leave, to which the landlord said he might, but no new bargain was made as to the tillages and improvements; it was held, that he was not entitled to the value of such as he left on so quitting (*x*). By the terms of a written agreement it was stated, that a certain quantity of manure had been spread on the land, and the tenant agreed, when given up by him, to leave the land in the same state, or allow a valuation to be made; it was held, that this agreement excluded a custom, as inconsistent with it, that the tenant should pay half-tillage on going in, and receive it on going out (*y*). An administrator of a deceased tenant is entitled to be paid according to the custom of the country for manure, tillages, &c.; but if he sues a person who purchased from another who claimed as devisee of the * deceased tenant the declaration should [*765] be in trover (*z*). An outgoing tenant, administratrix of a late tenant, having (after having had the farm for above a year) assigned to an incoming tenant, in consideration of

(*t*) Dalby *v.* Hirst, 1 B. & B. 224; 3 Moo. 536; Hutton *v.* Warren, 1 M. & W. 466; Senior *v.* Armytage, Bart., Holt, 197.

(*u*) Brocklington *v.* Saunders, 13 W. R. 46, Q. B.

(*x*) Whittaker *v.* Barker, 1 Cr. & M. 113.

(*y*) Clarke *v.* Roystone, 13 M. & W. 752. See also Womersley *v.* Dally, 26 L. J., Ex. 219.

(*z*) Searson *v.* Robinson, 2 F. & F. 351.

a debt due to him, all her goods and effects, and all stock, corn, grain, on the farm, and all her estate and interest thereon and therein: held, that this comprised tenant right or tillages on the farm (*a*).

How made. — The valuation of tillages, &c., between outgoing and incoming tenants should be made in like manner, mutatis mutandis, as hereinbefore mentioned with respect to valuation of dilapidations and fixtures (*b*). Where straw, &c., was consumed by the incoming tenant before any valuation thereof had been made or any valuers named or umpires appointed: it was held, that the outgoing tenant was entitled to recover the value under a count for money payable for straw, &c. (*c*).

Sect. 5. *Compensation for "Temporary, Durable, and Permanent" Improvements.*

Frequent reference has been made in this work to the custom of the country.

Prior to the year 1848, there appears to have been no documentary record of the complicated and varying customs existing in different districts throughout the kingdom.

Parliamentary Report, 1848. — In 1848, a Select Committee of the House of Commons, appointed at the instance of Mr. Pusey, presented an exhausted report upon the subject (*d*), which, however, is not at the present day perfectly reliable.

Agriculture Chambers Report, 1875. — But in 1875, there were published by the Central Chamber of Agriculture three reports on "Unexhausted Improvements" (*e*), and the last of these reports was accompanied by numerous schedules showing the then existing customs of the country in various districts of England in a tabular form.

(*a*) Cary *v.* Cary, 10 W. R. 669.

(*b*) *Ante*, Ch. XVI. Sect. 9.

(*c*) Clarke *v.* Westrope, 18 C. B. 765; 25 L. J., C. P. 287.

(*d*) This report was reprinted in 1866.

(*e*) The committee consisted of Sir Michael Hicks-Beach, M.P., Mr. G. F. Muntz, Mr. E. Heneage, Mr. C. S. Read, M.P., Mr. Masfen, Mr. Fowler, Mr. Little, Mr. Russon, and Mr. Lipscomb.

In the second report it was observed: —

New custom since 1848. — Your committee desire to draw the particular attention of the council to the marked difference between customs prevailing to-day and those *existing in the year 1848, [*766] when Mr. Pusey's Select Committee of the House of Commons issued its report. For example: — In Lincolnshire, at that time, no allowances were given for guano or other highly-concentrated manures, which are now universally allowed for in that county. Compensation for draining was then only partially introduced, though it is now a general custom in Lincolnshire. At that time there was no allowance in Staffordshire for purchased oilcake, feeding-stuffs, and artificial manure, or for marling, boning, liming, planting quickset hedges, or draining, all which are now subjects of compensation in, at any rate, the southern division of that county. In Cambridgeshire, in that part called the Isle of Ely, allowance for oilcake, for artificial manures, and for claying, is new, since the date of Mr. Pusey's inquiry. In Nottinghamshire allowances for draining were only partially introduced at that time, but are now universally the custom, together with compensation of road-making, planting quickset hedges, executing irrigation works, and making main drains, watercourses and reservoirs. In Cheshire there was at that period no allowance for either draining or planting quickset hedges, which, however, obtains in North Cheshire at the present time. In parts of Oxfordshire compensation for chalking and boning has been introduced since 1848. In South Wiltshire allowance for purchased manures is new. In parts of Gloucestershire artificial manures are now allowed for, and compensation is given for draining, though neither of these improvements was recognized by custom in 1848. And in parts of Dorsetshire a small allowance for oilcake, feeding-stuffs, and purchased manures, and also for draining, has been introduced, though there was no custom of the kind mentioned in the House of Commons' report. *This is sufficient to show that an inquiry and report of so early a date as* 1848 *is wholly insufficient to enable anyone to arrive at a correct conclusion regarding the established customs of the various counties in the present day.*

Customs founded on no principle. — Your committee would direct attention to the absence of any uniform principle upon which customs might be supposed to have originated. Thus guano is allowed for in some counties when applied to corn crops, in other counties only when applied to root or green crops; and in the latter case, some counties or districts pay for all, and some for only half the quantity used in the last year; and while some counties pay for no guano used in the last year but one of the tenancy, other counties pay for one-third of what is applied in that year. For oilcake the allowances vary from half the value of cake used in the last year, with nothing for cake used in the year before that, to one-fourth of the last year's and one-eighth of the previous year's cake, or two-thirds of the last year's and one-third of the previous year's consumption of oilcake. Compensation for tile draining ranges so diversely

that improvement is calculated in some counties to extend over six years, and in other counties up to fourteen years. Planting quickset is spread over varying periods from three to ten years. Liming arable land is supposed to benefit the tenant from five years down to only two years; and liming pastures is taken as lasting three years in some counties, up to six years in others.

The returns show that in some counties, in lieu of money compensation for purchased feeding-stuffs and manures, the outgoing tenant is entitled to an away-growing crop; but a large number of the returns show that in many counties and districts no compensation whatever for temporary improvements is secured by custom either in money or crop, and up to the present time your committee have not received a single intimation of the existence of any custom securing to the tenant compensation for buildings, excepting structures not attached to the freehold, which he is, of course, at liberty to remove.

[*767] *In the third report (presented in 1874) the Committee observed: —

Your committee have experienced much difficulty in ascertaining what is understood to constitute an "established custom." According to the common acceptation of the term, a custom must have obtained from time immemorial (*f*); *but your committee find from the returns received that customs affecting allowances to an outgoing tenant have been considerably changed by additions from time to time within living memory. This state of transition is especially remarkable at the present time.* But it is to be observed that, while the process of gradually introducing, extending, and altering custom is going on in some districts, the greater portion of England still remains without any custom affording compensation for the tenant's capital expended in improvements.

Returns have been received from fifty-five districts, namely, — Berkshire, Newbury; Cambridgeshire, Isle of Ely, North; Cheshire, Northwich; Cheshire, Knutsford; Cheshire, Nantwich; Cheshire, North; Derbyshire; Devonshire, East; Devonshire, Central; Dorsetshire, Vale of Blackmoor; Dorsetshire, Central; Dorsetshire, Blandford; Durham; Essex, North; Gloucestershire, West; Gloucestershire, Cotswold; Gloucestershire, Cirencester; Gloucestershire, West of Cheltenham; Gloucestershire, East and North of Cheltenham; Gloucestershire, Forest of Dean; Gloucestershire, Valley of the Severn; Gloucestershire, Tetbury; Gloucestershire, Stow-on-the-Wold; Gloucestershire, Ledbury; Gloucestershire, Tewkesbury; Hampshire, North; Hampshire, Andover; Herefordshire; Kent, the Weald; Kent, East; Lancashire, South; Lancashire, North, Lincolnshire; Lincolnshire, Marshes; Norfolk; Norfolk, Marshland; Northamptonshire, South; Northamptonshire, Weedon; Northum-

(*f*) But see the law as to this, Senior *v.* Armytage, Holt, N. P. 197, and 725 (*d*), *ante*.

berland, Tyneside; Nottinghamshire; Oxfordshire, Henley-on-Thames; Shropshire; Somersetshire, North; Staffordshire; Staffordshire, South; Suffolk; Suffolk, Sudbury; Warwickshire; Wiltshire, Swindon; Wiltshire, South; Worcestershire; Yorkshire, North and East Ridings, Malton; Yorkshire, North and West Ridings, Ripon; Yorkshire, West Riding, Wakefield; Yorkshire, West Riding, Barnsley; Yorkshire, East Riding.

The area reported upon includes districts extending from the most northern to the most southern, and from the most eastern to the most western limits of England.

From the variations in practice occurring within comparatively limited districts, as revealed by your committee's inquiry, it is evident that customs cannot be correctly defined and classified as "county" customs, and that, so far from each county possessing a distinct and peculiar usage co-extensive with its area, a map of England in which the prevalence of each custom should be represented by a distinguishing colour would exhibit a series of most irregularly-shaped and unequally-distributed patches — the most conspicuous feature being the very small proportion of the surface of England enjoying any custom of adequate compensation even for purchased feeding-stuffs and manures.

The labour of your committee has principally consisted in preparing the forms of inquiry, and collecting, arranging and tabulating the information communicated; and they must refer the council to the voluminous details condensed in the summary schedules, it being impossible to convey, in any general statement within the ordinary limits of a report, either a full knowledge of their contents, or the comparisons and deductions which, it is hoped, will render them of great value.

[*768] ***"Temporary," "durable," and "permanent" improvements.** — The schedules annexed to this report divided improvements (*g*) into three classes — (1) "temporary," being allowances for crops, cultivation, and farmyard manure, and for purchased feeding-stuffs and purchased manures; (2) "durable," being allowances for liming, boning, &c.; and (3) "permanent," being allowances for tile draining, making roads, &c. These three classes correspond to the "third class," "second class," and "first class" improvements for which compensation was given by the Agricultural Holdings Act of 1875 in cases where that Act was applicable, but not to the improvements mentioned in the first schedule to the

(*g*) The schedules also contain valuable information as to the rights of pre-entry, prohibited crops, &c. See Table showing rights of pre-entry, *ante*, 755.

Agricultural Holdings Act, 1883, which improvements are differently classified, though they are of the same kind.

In the two former editions of this work a table was printed, made up from the schedules to this report, showing the compensation payable by custom for the temporary, durable, and permanent improvements. The Act of 1875, by allowing compensation to be claimed under the custom, instead of under the Act (see s. 69), rendered a knowledge of the custom still necessary. The Act of 1883 (see s. 57) has substituted compensation under that Act for compensation under the custom, so that a knowledge of the custom is now but of little value, and the table, therefore, is now omitted.

Allowances for crops, cultivation, and farmyard manure. — The allowances, however, for crops, cultivation, and farmyard manure, where not provided for by contract, are still in very numerous cases provided for by custom. Such allowances are entirely outside the Agricultural Holdings Act, and are expressly saved by s. 60 of the Act of 1883.

THE AGRICULTURAL HOLDINGS ACT, 1883.

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SECT. 1. — *Object and Application of the Act.*

Fivefold division of the act. — The Agricultural Holdings Act, 1883 (46 & 47 Vict. c. 61), which was passed on the 25th of August, 1883, and came into operation on the 1st January, 1884, deals with five distinct matters. First, it gives agricultural tenants compensation for certain specified improvements, as will be presently explained. Secondly, it gives to such tenants the property in fixtures, subject to the landlord's option of purchase. Thirdly, it relaxes in favour of such tenants the rigour of the law of distress. Fourthly, it converts into a year's notice the half-year's notice impliedly required by law in case of an implied tenancy from year to year. Fifthly, it allows the landlord of any tenant holding from year to year to resume possession, for the purpose of making certain specified improvements, of a part of the demised premises, by a partial notice to quit. The last four of these divisions have been already dealt with in the text (*a*); and the act itself is printed at length in the Appendix.

Compensation for improvements. — It is now proposed to

(*a*) As to fixtures, see p. 634; as to distress, see p. 430; as to the year's notice to quit, see p. 335; and as to the resumption for improvements, see p. 336.

deal with the first and main division of the act, that by which, as it is expressed in the 1st section: —

"Where a tenant has made on his holding any improvement comprised in the First Schedule hereto, he shall on and after the commencement of this act be entitled on quitting his holding at the determination of a tenancy to [*770] obtain from the landlord as * compensation under this act for such improvements such sum as fairly represents the value of the improvement to an incoming tenant; provided always, that in estimating the value of any improvement in the First Schedule hereto there shall not be taken into account as part of the improvement made by the tenant what is justly due to the inherent capabilities of the soil."

Determination of tenancy. — By sect. 61, the interpretation clause, which should always be referred to when any difficulty of construction arises, "determination of tenancy" means "the cesser of a contract of tenancy by effluxion of time or from any other cause," a definition which is not very clear, but which would seem to include not only determination by notice to quit, but also determination by surrender, and perhaps even determination by forfeiture.

To what holdings the act applies. — By the effect of sections 1, 54 and 61, the act seems to apply to the following holdings, however small in extent, and to no others: —

Holdings either wholly agricultural or wholly pastoral, or partly agricultural and partly pastoral, or wholly or partly cultivated, as market gardens, held under a landlord for a term of years, or for lives, or for lives and years, or from year to year, by a tenant holding no employment under such landlord.

Tenancies at will, therefore, and tenancies for less than two years, are excluded from the operation of the act. Nor would the act seem to apply to the fictitious tenancies (though from year to year) created by a mortgage deed.

SECT. 2. — *The Agricultural Holdings Act*, 1875.

(a) *Generally.*

Commencement. — The Agricultural Holdings Act, 1875 (38 & 39 Vict. c. 92), which was passed on the 13th August,

1875, and commenced on the 15th February, 1876 (sect. 58), is repealed by sect. 62 of the act of 1883, but with such important savings for rights to compensation for the improvements to which it applies, if executed before the commencement of the Act of 1883, that it is necessary to say a few words about the Act of 1875.

Act applied. — The act applied only to a "holding either wholly agricultural or wholly pastoral, or in part agricultural and as to the residue pastoral," and did not apply to such holdings unless they amounted to two acres or more. But the act applied to all such tenancies, if created after the commencement of the act, and to all such tenancies from year to year, current at the commencement of the act, unless the operation of * the act had been formally excluded [*771] by writing. But although it might not have been excluded in writing, the landlord and tenant might displace its operation (1) by mutual agreement, and (2) by taking advantage of the custom of the country. Such is shortly the effect of sects. 54, 56, 57, 58, 59 and 60, which are now subjoined.

Power to displace act by agreement. — By sect. 54, "nothing in this act shall prevent a landlord and tenant, or intending landlord and tenant, from entering into and carrying into effect any such agreement as they think fit, or shall interfere with the operation thereof."

Adoption of parts of act. — By sect. 55, parts only of the act might be adopted by mutual agreement in writing.

Exclusion of act by writing. — By sect. 56, "this act shall apply to every contract of tenancy beginning after the commencement of this act, unless in any case the landlord and tenant agree in writing, in the contract of tenancy *or otherwise*, that this act, or any part or provision of this act, shall not apply to the contract; and in that case, this act, or the part or provision thereof to which that agreement refers (as the case may be), shall not apply to the contract."

Tenancy from year to year. — By sect. 57, "in any case of a contract of tenancy from year to year or at will, current at the commencement of this act, this act shall not apply to the contract, if, within two months after the commencement of

this act, the landlord or the tenant gives notice in writing to the other to the effect that he (the person giving notice) desires that the existing contract of tenancy between them shall remain unaffected by this act; but such a notice shall be revocable by writing; and in the absence of any such notice, this act shall apply to the contract. In every other case of a contract of tenancy current at the commencement of this act, this act shall not apply to the contract."

Operation of act on custom of country. — By sect. 59, a tenant might not claim compensation both under the act and under a custom of the country "in respect of the same work or thing;" and by sect. 60 there is a saving for (inter alia) rights under "any customs of the country."

(b) *Compensation under the Act of* 1875.

Three classes of "improvements." — The act of 1875 (sects. 5—19) dealt, and dealt separately, with three "classes" of "improvements." The first class included thirteen kinds of improvement, such as drainage and other works of construction of an extensive and expensive character; the second, six kinds, such as boning of land with undissolved bones and other expensive modes of fertilizing the land; the third, two kinds only, both arising from manure.

1st class. — The improvements of the first class were, by sect. 5, as follows: —

(1) Drainage of land; (2) Erection or enlargement of buildings; (3) Laying down of permanent pasture; [*772] (4) Making and planting of * osier beds; (5) Making of water meadows or works of irrigation; (6) Making of gardens; (7) Making or improving of roads or bridges; (8) Making or improving of watercourses, ponds, wells, or reservoirs, or of works for supply of water for agricultural or domestic purposes; (9) Making of fences; (10) Planting of hops; (11) Planting of orchards; (12) Reclaiming of waste land; (13) Warping of land.

By sect. 10, the consent in writing of the landlord had to be obtained previously to executing any of the above [1st class] improvements, otherwise the tenant was not entitled to compensation.

By sect. 6, any of the above improvements "shall not in any case be deemed to continue unexhausted" beyond the end of *twenty* years "after the year of tenancy in which the outlay thereon is made."

By sect. 7, the amount of the tenant's compensation in respect of any of the above improvements was "the sum laid out by the tenant on the improvement, with a deduction of a proportionate part thereof for each year while the tenancy endures after the year of tenancy in which the outlay is made, and while the improvement continues unexhausted."

Here it is important to observe the main distinction between the Acts of 1875 and 1883, that whereas the Act of 1875 provided, except in the case of a third-class improvement, a compensation on the basis of outlay, the Act of 1883 uniformly provided, as did the Act of 1875 in the cases of a third-class improvement, a compensation on the basis of value to an incoming tenant.

2nd class. — The improvements of the second class were (sect. 5) as follows: —

(1) Boning of land with undissolved bones; (2) Chalking of land; (3) Clay burning; (4) Claying of land; (5) Liming of land; (6) Marling of land.

By sect. 6, any of the above improvements "shall not in any case be deemed to continue unexhausted" beyond the end of **7** years "following after the year of tenancy in which the outlay thereon is made."

By sect. 12, "the tenant shall not be entitled to compensation in respect of any of the above improvements unless not more than **42** and not less than **7** days before beginning to execute it, he has given to the landlord notice in writing of his intention to do so;" "nor," proceeds the section, "where it is executed after the tenant has given or received notice to quit, unless it is executed with the previous consent in writing of the landlord."

By sect. 8, the amount of compensation was "the sum *properly* laid out by the tenant on the improvement, with a deduction of a proportionate part thereof for each year while

the tenancy endures after the year of tenancy in
[*773] which the outlay is made, and while the * improvement continues unexhausted." The qualification "properly," it will be observed, did not occur in sect. 7, which regulated the amount of compensation for first class improvements.

3d class. — The third class improvements were, by sect. 5, as follows:—

Application to land of purchased artificial or other purchased manure; and consumption on the holding, by cattle, sheep, or pigs, of cake or other feeding-stuff not produced on the holding, but as by sect. 6, the above improvements "shall not in any case be deemed to continue unexhausted" beyond the end of 2 years "following after the year of tenancy in which the outlay thereon is made," this part of the act is now (January, 1886) so nearly spent, that no more need be said about it.

Under sects. 16—19 the tenant's compensation for an improvement of any of the three classes was subject to deduction for arrears of rent, damage by waste and other matters.

(c) *Assessment of Compensation under Act of* 1875.

Notice to landlord of intended claim. — By sect. 20 of the act, "a tenant shall not be entitled to obtain compensation unless one month at least before the determination of the tenancy he gives notice to the landlord of his intention" to claim it; and the landlord may, where such notice is given, give "before the determination of the tenancy, or within 14 days" thereafter, a counter-notice of an intention to claim compensation on his part. By sect. 21, the amount and mode and time of payment of compensation are to be settled by a reference, in case the parties do not agree.

Sects. 22—41, which followed, contained a procedure for assessment of compensation, differing so slightly from the sections in pari materiâ of the Act of 1883 that it is not necessary to say anything about them; especially as in Smith *v.* Acock (*b*) it was held that a claim under the Act of 1875 might be dealt with under the procedure of the Act of 1883.

(*b*) 53 L. T. 230.

although the compensation, as has been already pointed out, would have to be assessed on a different basis in many cases.

(d) *The General Exclusion of the Act of* 1875.

Operation of Act of 1875 in general excluded. — It is beyond doubt that the operation of the act was, as a general rule, excluded by landlords, and its permissive character was severely criticised. On the 1st of May, 1876, the proprietors of the "Mark Lane Express" published a supplement to that journal, shewing in *a tabular form, [*774] from very copious returns furnished "chiefly by farmers and land agents, with a few landowners," how far, how, and why the act had been excluded. These returns, it was correctly said, showed conclusively (1) that the act in May, 1876, was very nearly a dead letter; (2) that it was the landlords who, in the vast majority of instances, had given notice to exclude it; and (3) that the farmers for the most part did not desire to come under the act. The reasons for this indifference, if not hostility, on the part of the farmers were various; — most being satisfied with existing agreements, many having confidence in their landlords, preferring a custom of the country, or dreading litigation, and some few believing the act to be in the interest of landlords rather than of tenants.

Extent of operation of Act of 1875. — It must be borne in mind, however, that the act applied to all Crown and Duchy of Cornwall lands, and that inadvertence and other causes tending to prevent the exclusion of the act in *writing*, it must necessarily have come into operation to a considerable extent, especially on small holdings.

(e) *Repeal of the Act of* 1875.

The Act of 1875 is repealed by s. 62 of the Act of 1883 as from the 1st January, 1884, but that section expressly provides that the repeal shall not affect anything done or pending under the Act of 1875, or "any right to compensation in respect of improvements" to which the Act of 1875 applies,

"and which were executed before the commencement of the act" [1st Jan., 1884], or "any right to compensation in respect of any improvement" to which the Act of 1875 applies, "although executed by a tenant after the commencement of this act [1st Jan., 1884], if made under a contract of tenancy current" [see s. 61 of the Act of 1883] "at the commencement of the act."

So much for the wholly permissive and prospective Act of 1875. Let us now pass to the wholly compulsory and partly retrospective compensation clauses of the Act of 1883.

Sect. 3. — *Compensation under Agricultural Holdings Act*, 1883 (*c*).

At common law a tenant had no right (*d*) to compensation for any improvements or acts of husbandry. The common law implies a contract on the part of an agricultural [*775] tenant to cultivate in a * husbandlike manner (*e*), so that a landlord can at common law recover damages from a tenant for doing less than sufficient on the land, but it implies no contract on the part of the landlord to compensate the tenant for doing more than sufficient, or even to pay him for the seeds and labour of the last year of the tenancy.

Compensation by custom. — Out of this hardship to the tenant arose and multiplied those various "customs of the country" already adverted to (*f*), under which the tenant became entitled to be paid, in the majority of counties for seed and labour of a last year, in a large number of districts for artificial manure, and in a few districts, pre-eminently in Lincolnshire, for drainage and buildings.

Compensation by contract. — The indefinite character of many of the customs, and the increasing necessity for the application of artificial manures led to the embodiment in many

(*c*) This section is partly adopted from the introduction to Lely and Pearce-Edgcumbe's Law of Agricultural Holdings.

(*d*) For the exception in the peculiar case of "emblements," see Ch. XX. Sect. 3, *ante*.

(*e*) Legh *v.* Hewitt, 4 East, 154; Powley *v.* Walker, 5 T. R. 373.

(*f*) *Ante*, Ch. XX.

contracts of tenancy of elaborate compensation clauses, usually based upon the custom of the country in districts where there was a compensation custom, but developing the rights of the tenant with greater precision than that which the rights under the custom had attained.

Policy of the act. — It is the policy of the Agricultural Holdings Act, 1883, to exclude compensation by custom, that is, implied contract, in all the cases in which compensation is given by the act. By s. 57, "a tenant shall not be entitled to claim compensation by custom in respect to any improvement for which he is entitled to compensation under or in pursuance of this act." But it is equally the policy of the act to maintain compensation by express contract. By s. 3, compensation for the more permanent improvements, such as buildings, is not payable unless the landlord has previously agreed to their being executed, and by s. 5, where "compensation" is provided in writing in the case of a contract of tenancy current at the commencement of the act, or where "fair and reasonable" compensation is provided in writing for improvements (other than those for which the consent of or notice to the landlord is required) in the case of a contract of tenancy beginning after the commencement of the act, such agreement in writing prevails over the act, and a "substituted compensation" under the agreement is payable instead of the compensation under the act.

Determination of tenancy. — The right to compensation by s. 1 of the act vests in a tenant on "quitting his holding at the determination of his tenancy;" and by s. 6, "determination of tenancy" means "the cesser of a contract of tenancy by reason of effluxion of time, or from any other cause," a definition which clearly includes determination by notice to quit and surrender, and also — though this may admit of doubt, on the ground that forfeiture, resulting as it does from the wrongful act of the tenant, * is not [*776] ejusdem generis with effluxion of time — determination by forfeiture.

Compensation to "sitting tenant." — No compensation is payable to a "sitting tenant," that is to a tenant whose tenancy continues after the execution of the improvement: but in

the case where a tenant holds under a limited owner, and wishes, after executing an improvement, to have his contract of tenancy renewed, the 43rd section of the act allows — though it does not enjoin — the limited owner on renewing the contract and estimating the future rent, to leave out on account against the tenant, notwithstanding the requirement of a "best rent" by s. 7, sub-s. 2, of the Settled Land Act (*g*), any increase in the value of the holding which may have arisen from any improvement made or paid for by the tenant.

To what holdings act applicable. — The act, as has been already pointed out, applies by virtue of ss. 1, 54, and 61, to

Holdings, however small, either wholly agricultural or wholly pastoral, or partly agricultural and partly pastoral, or wholly or partly cultivated as market gardens, held under a landlord for a term of years, or for lives, or for lives and years, or from year to year by a tenant holding no employment under such landlord.

To what improvements the act applies. — The improvements to which, and to which only, the act applies, are specified in the First Schedule, and are: —

1. *Buildings, ensilage, pasture, osier beds, water meadows, irrigation works, gardens, roads, bridges, watercourses, &c., fencing, hop-planting, fruit-planting, warping, and embankment against floods.*

These improvements require the written consent of the landlord. For none of them, by s. 3, is compensation payable —

"Unless the landlord or his agent duly authorized in that behalf, has previously to the execution of the improvement, and after the passing of this act [25th August, 1883], consented in writing to the making of such improvement."

"Any such consent may be given by the landlord unconditionally, or upon such terms as to compensation or otherwise, as may be agreed upon between the landlord and the tenant, and in the event of any agreement being made between the landlord and the tenant, any compensation pay-

(*g*) *Ante*, p. 7.

able thereunder shall be deemed to be substituted for compensation under the act."

Upon this section it should be observed that buildings and fencing, if no compensation be payable for them, become the property of and removable by the tenant, subject to the landlord's power of purchase, under s. 34 of the act (*h*). As to the terms of compensation, it is conceived that they must involve some substantial benefit to the tenant, *and must not neutralize s. 55 of the act, which will [*777] presently be considered so as to deprive him altogether of the right to compensation which that section declares to be inviolate.

2. *Drainage.*

This improvement requires a previous written notice to the landlord. By s. 4, no compensation is payable for drainage —

Notice to landlord. — "Unless the tenant has, not more than three months and not less than two months before beginning to execute such improvement, given to the landlord, or his agent duly authorized in that behalf, notice in writing of his intention so to do, and of the manner in which he proposes to do the intended work."

The omission to give the required notice within the required time will be fatal to the claim for compensation, unless in accordance with a proviso to s. 4 the landlord and tenant may have dispensed with the notice, and made some special agreement between themselves as to drainage.

Effect of notice. — Upon the notice being given, one of three results may happen. Either —

(1.) The landlord and tenant may agree on the compensation to be paid, which compensation is to be "substituted" for compensation under the act, *or*

(2.) The landlord may execute the drainage himself "in any reasonable and proper manner he may think fit" and charge the tenant with not more than 5 per cent. on the outlay, *or*

(3.) "In default of any such agreement or undertaking

(*h*) *Ante*, p. 634.

[of the landlord to execute the drainage], and also in the event of the landlord failing to comply with his undertaking within a reasonable time, the tenant may execute the improvement himself, and shall in respect thereof be entitled to compensation under this act."

In the third part of the schedule are comprised:

Boning with undissolved bones, chalking, clay-burning, claying, liming, marling. Application of purchased manure, and consumption on the holding by cattle, sheep, and pigs of cake or other feeding-stuff not produced on the holding.

To obtain compensation for these improvements neither the consent of, nor any notice to, the landlord is required before executing the improvement, but notice (of which hereafter, post, p. 780) must be given before claiming the compensation.

How far act retrospective. — By s. 2, if any of the above improvements were executed within ten years before the commencement of the act [1st January, 1884], and if *neither* the Act of 1875, *nor* contract, *nor* custom secure compensation to the tenant, then the Act of 1883 is retrospective, and compensation under it is payable although the improvement may have been executed before the commencement [*778] of the act; but in the case of *buildings and the other improvements mentioned in the first part of the schedule, and in the case of drainage, the landlord must have some time during the year 1885 declared in writing his consent thereto, for the compensation to be payable. In the case of boning and the other improvements mentioned in the third part of the First Schedule, no such consent on the part of the landlord is required.

Avoidance of agreement inconsistent with right to compensation. — The Act of 1875 was purely permissive, as we have seen (ante, p. 771). The Act of 1883, on the other hand, as far as the right to compensation is concerned, is purely compulsory. Such is the undoubted effect of s. 55, which is as follows: —

"Any contract, agreement or covenant made by a tenant by virtue of which he is deprived of his right to claim compensation under this act in respect of any improvement

mentioned in the First Schedule hereto (except an agreement providing such compensation as is by this act permitted to be substituted for compensation under this act), shall, so far as it deprives him of such right, be void both at law and in equity."

Nor can the tenant's right to compensation be indirectly got rid of by any agreement on his part not to make improvements at all. Such an agreement would, it is submitted, be so contrary to the spirit of the act and to the public policy of stimulating the general fertility of the soil of the country, that the words "right to claim compensation" ought not to be construed strictly, but ought to be taken to include "right to receive compensation." Such an agreement therefore, if made, may be disregarded, and the tenant may proceed to execute the improvements mentioned in the act, and to claim compensation for them as if it had not been made (*i*).

It should be pointed out however that the act (see ante, p. 770) does not apply to a tenancy at will, or to a tenancy for less than two years, so that such tenancies, however long continued or however often renewed, if the continuance or renewal be purely voluntary on the landlord's part and not in pursuance of any agreement with the tenant, do not entitle the tenant to compensation.

An agreement inconsistent with the right to compensation is void only, and not illegal so as to subject any party proposing or making it to penalties, and it is void only in itself, and does not avoid any other stipulation of the contract of tenancy of which it may form a part.

Substituted compensation generally. — Although the act is compulsory in principle, it is not compulsory in detail, but allows the parties to agree upon a "substituted compensation," that is a compensation of a character determined by * themselves — upon the basis of outlay for [*779] instance, instead of upon the basis of value to an incoming tenant, as determined by s. 1 of the act. This is expressly provided by s. 3 of the act in relation to buildings and other improvements mentioned in Part I. of the First

(*i*) See further on this subject, Lely and Pearce-Edgcumbe's Agricultural Holdings Act, 2nd ed., p. 133.

Schedule by s. 4 in relation to drainage, and by s. 5 in relation to boning and other improvements mentioned in Part III. of the First Schedule. By s. 17, where compensation is claimed, and "substituted compensation" has been provided, the amount of such substituted compensation is to be determined by a reference under the act as hereafter described (post, p. 780) and not by action.

Substituted compensation for boning, &c., must be "fair and reasonable." — The substituted compensation for boning and other improvements mentioned in Part III. of Sched. 1, must be "fair and reasonable," otherwise the provisions of any agreement attempting to provide it will be void, and the compensation will have to be assessed on the basis fixed by the act itself of the value to an incoming tenant. For sect. 5 provides that "where in the case of a tenancy under a contract of tenancy beginning after the commencement of this act any particular agreement in writing secures to the tenant for any improvement mentioned in the third part of the First Schedule hereto, and executed after the commencement of this act, *fair and reasonable* compensation, having regard to the circumstances existing at the time of making such agreement, then, in such case, the compensation in respect of such improvement shall be payable in pursuance of the particular agreement, and shall be deemed to be substituted for compensation under this act."

The "particular agreement in writing" mentioned in this section need not be separate from the contract of tenancy itself, but it is essential that it should deal with and give compensation for each of the items of improvement mentioned in the third part of the First Schedule; otherwise, so far as regards any omitted item the "particular agreement" will be void, and the statutory basis of value to an incoming tenant will come into force.

Meaning of "fair and reasonable." — The compensation is to be "fair and reasonable having regard to the circumstances at the time of the agreement." In practice it will be often extremely difficult to say what satisfies these words, especially where an agreement is of long standing. The questions that will arise appear to be questions of fact for

the arbitrators, but it seems that the burden of proving fairness, &c., will lie upon the landlord. Various district "Chambers of Agriculture" have framed "scales" of compensation which they consider reasonable, and it is submitted that any particular agreement incorporating any such scale ought to be considered to be primâ facie fair and reasonable. It is desirable, though not essential, that a contract of tenancy providing for substituted compensation should expressly state that it is intended to be * "substi- [*780] tuted," and should also recite the particular circumstances, if any.

Sect. 4. — *The Claim for Compensation.*

Notice of claim by tenant. — Two months' notice of any claim should be given. For by s. 7 of the act: —

"A tenant claiming compensation under this act shall two months at least before the determination of the tenancy, give notice in writing to the landlord of his intention to make such claim."

The omission to give the notice in time would seem to be fatal, though this very important point cannot be said to be without doubt, on the ground that in the corresponding s. 20 of the repealed Act of 1875, express negative words were used.

Counter-claim by landlord. — By s. 7 also, "where a tenant gives such notice, the landlord may before the determination of the tenancy, or within fourteen days thereafter, give a counter notice in writing of his intention to make a claim in respect of any waste or any breach of covenant or other agreement."

The landlord's right to counter-claim *under the act* does not arise unless the tenant claims. He is not bound however to counter-claim, but may bring his action against the tenant at law.

Sect. 5. — *The Reference.*

Reference compulsory. — If the parties cannot agree upon the amount payable, a reference is compulsory: the tenant has no right of action for the compensation, nor, if he be sued

by the landlord for arrears of rent, can he counter-claim for the compensation (*k*). By s. 8 the difference "shall be settled by a reference," and by s. 57, "a tenant shall not be entitled to claim compensation otherwise than in manner authorized by the act."

Determination of claims outside act by same reference. — It will of course frequently happen that the tenant has claims against the landlord in respect of matters outside the act, as for seeds and labour and minor acts of husbandry either under a custom or by express contract of tenancy. It may frequently be desired that both sets of claims — those under the act and those outside the act — should come before the same arbitrators. This can easily be done, but care [*781] * should be taken to ensure an arbitrament of the two sets of claims by separate awards.

Appointment of referees and umpire. — By s. 9 the reference may be to a single referee jointly appointed, or to two referees, one appointed by each party. If two referees are appointed, they must appoint an umpire before entering on the reference. Notice in writing of every appointment of a referee must be given to the other party. By s. 10 provision is made for the appointment of an umpire by the Land Commissioners or the Judge of the County Court "within the district whereof" [see s. 61], "the holding or the larger part thereof is situate," or by consent [see s. 11] the registrar of such Court.

Submission irrevocable. — By s. 12 "neither party shall have power to revoke a submission or the appointment of a referee, without the consent of the other."

Procedure and evidence. — By s. 13 the referees may call for vouchers and other evidence, and may administer oaths; and by s. 14 a reference may, after notice to the parties, proceed in the absence of either party.

SECT. 6. — *The Assessment of Compensation.*

Value to an incoming tenant. — By s. 1 of the act the compensation is to be "such sum as fairly represents the value

(*k*) Gaslight and Coke Co. *v.* Holloway, 52 L. T. 434.

of the improvement to an incoming tenant, provided always, that there shall not be taken into account as part of the improvement made by the tenant what is justly due to the inherent capabilities of the soil."

The extremely difficult questions arising upon this section are mainly questions of fact. Outlay, the basis adopted by the Act of 1875, is now purposely superseded by the basis of value to an incoming tenant, so that in many cases a heavy outlay, which has resulted in far less value than might reasonably have been expected at the time it was incurred, may give ground for little or no compensation on the ground of the conditions of agriculture having changed. Compensation too may often (and with more justice) be forfeited in cases where the outlay was great, but the execution extravagant or negligent. The "incoming tenant" is a hypothetical one, and what the particular incoming tenant, if any, may think the improvement to be worth is no necessary criterion of the statutory value. Although there may be no incoming tenant or prospect of one, compensation is none the less payable.

Inherent capabilities of the soil. — The expression "Inherent capabilities of the soil" appears to have been derived from a passage in Mr. Butt's Treatise on the Irish Land Act, which has been cited with approval by an Irish Court (*l*). It is no doubt unjust that the landlord as owner of the soil should have to pay * the tenant for an increased value [*782] derived not from the labour or skill of the tenant but from the quality of the soil itself. The proviso however merely seems to express what would have been implied without it.

Set-off against compensation. — By s. 6 the landlord has certain important grounds of set-off. First, there may be set-off any benefit which he has given [such as reduction of rent] in consideration of the tenant executing the improvement. Secondly, "in the case of compensation for manures, the value of the manure which would have been produced by the consumption on the holding of any hay, straw, roots, or green crops sold off or removed from the holding within

(*l*) See Adams *v.* Dunseath, 19 L. R., Ir. 109.

the last two years of the tenancy or other less time for which the tenancy has endured, except as far as a proper return of manure to the holding has been made in respect of such produce so sold off or removed therefrom." Thirdly, there may be set-off arrears of rent, and also "any sums due in respect of any waste committed or permitted (*m*) by the tenant," or in respect of any breach of covenant or agreement in connection with the contract of tenancy, committed not more than four years before the determination of the tenancy.

Augmentation of compensation. — The same section provides for an augmentation of the compensation in respect of any breach of covenant or agreement in connection with the contract of tenancy by the landlord.

Sect. 7. — *The Award, and Appeal therefrom.*

Time for award. — By s. 16, the award (which by s. 15 must be in writing and signed) must be made by a single referee within 28 days after his appointment, by two referees within 28 days after the appointment of the last appointed of them, "or within such extended time, if any, as they from time to time jointly fix by writing under their hands, so that they make their award ready for delivery within a time not exceeding in the whole 49 days after the appointment of the last appointed of them," and by umpire (s. 19) within 28 days after notice of the reference to him, or within such extended time as may be appointed by the County Court Registrar.

Form of the award. — The award must be very precise and particular. By s. 19 it must, so far as possible, specify the improvements for which compensation is awarded, the time at which each improvement was executed, and the sum awarded in respect of each improvement.

Payment of the compensation money. — By s. 21 the award must fix a day for the payment of the money awarded, and such day must not be sooner than one month after [*783] the *delivery of the award. By s. 24 the money awarded, if not paid within fourteen days after such

(*m*) As to voluntary and permissive waste, see *ante*, Ch. XVI. Sect. 5, p. 608.

day, is recoverable upon order made by the judge of the County Court.

Costs of award. — By s. 20 the costs of the reference "shall be borne and paid by the parties in such proportion as to the referees or umpire appears just, regard being had to the reasonableness or unreasonableness of the claim of either party in respect of amount or otherwise and to all the circumstances of the case." By the same section "the award may direct the payment of the whole or any part of the costs aforesaid by either party to the other," but the costs may be taxed by the County Court Registrar.

Appeal to county court. — By s. 22 the award is questionable only as provided by s. 23, and by s. 23, *where the sum claimed exceeds* 100*l.*, either party may within seven days after delivery of the award, appeal against it to the judge of the county court on all or any of four specified grounds. These grounds are: —

(1) Invalidity of award, as to which ground Russell on Arbitrations should be consulted:
(2) Improper application or omission to apply the provisions of the act as to "substituted compensation:"
(3) The awarding of compensation or set-off where none due:
(4) The non-awarding of compensation where due.

It will be seen that an appeal as to mere amount is excluded. The judge must hear and determine the appeal, and may remit the case to be reheard.

Appeal to High Court from county court. — The decision of the county court judge on appeal is final, "save that the judge shall at the request of either party state a special case on a question of law for the judgment of the High Court of Justice, and the decision of the High Court on the case and respecting costs and any other matter in connection therewith shall be final, and the judge of the county court shall act thereon."

SECT. 8. — *Recovery of Compensation awarded, and Charge on Holding.*

Recovery of compensation money. — The compensation money is recoverable from the landlord personally unless he be a trustee, in which case it is recoverable by process against the holding only, and no person is liable for its payment.

Charge on holding. — If the landlord be a tenant for life of a settled estate or incumbent of a benefice, he may, on paying the compensation money, obtain from the county court a charge upon the holding and may assign such charge to a land company incorporated by statute — that is, he [*784] may *borrow the money of such company and make the holding the security for the repayment of the loan.

Landlord, unless trustee, may not deliver up the land in lieu of the money. — A trustee landlord may by s. 31 give the tenant a charge on the holding in lieu of the compensation money, so that in effect he may force the tenant to take the holding itself in lieu of such money. A landlord entitled to the rents and profits as trustee, or in any character otherwise than for his own benefit, is by s. 31 not personally liable for the compensation money.

But all landlords who are beneficial owners are personally liable to the whole extent of their assets, even if there be no incoming tenant, or even if the holding be so much depreciated notwithstanding the improvements, as not to have a saleable value equal to the compensation money. It appears that even in such an extreme case, the landlord may not rid himself of the liability for the compensation money by handing over the land in lieu of it.

Payment of compensation money by incoming tenant. — The compensation money is primarily payable by the landlord in like manner as compensation due under a custom is (*n*); but s. 56 of the act makes provision for the case of the outgoing tenant receiving the compensation money direct from the incoming tenant to avoid circuity and in conformity with the practice in connection with compensation due by custom. By this section it is enacted that —

(*n*) See Faviell *v.* Gaskoin, 7 Ex. 273, and 573, *ante*.

"Where an incoming tenant has, with the consent in writing of his landlord, paid to an outgoing tenant any compensation payable under or in pursuance of this act in respect of the whole or any part of any improvement, such incoming tenant shall be entitled on quitting the holding to claim compensation in respect of such improvement or part in like manner, if at all, as the outgoing tenant would have been entitled if he had remained tenant of the holding at the time at which he quits the same."

Under this section an outgoing tenant who takes to the improvements of his predecessor, will not be entitled to be reimbursed the amount paid, but only to be paid such amount as shall represent the value of the improvements to his successor.

Sect. 9. — *Concluding Observations.*

The leading sections of the act having been now gone through, it remains to state that the act is printed at length in the appendix. The interpretation clause (s. 61) should always be consulted before an opinion is given on any particular section. The act by ss. 35 and 36 applies to Crown and Duchy Lands. The various powers given by the *act may not, by ss. 38–40, be exercised by an [*785] archbishop or bishop without the written approval of the Ecclesiastical Commissioners, by incumbents of benefices without that of the patrons, and by charity trustees without that of the Charity Commissioners.

Comparative advantages. — A serious practical question for both landlord and tenant will always be, whether to leave the compensation to depend entirely upon the act, or to incorporate by way of "substituted compensation" a definite scale of allowances. The District Chambers of Agriculture, which are usually constituted by persons equally representing landlords and tenants, have drawn up elaborate scales of allowances, and the Central Chamber has issued a report upon them (*o*) recommending for general adoption under

(*o*) See the Scales and the Report, Lely and Pearce-Edgcumbe's Agricultural Holdings, p. 345.

the head of "Consumption on the holding by cattle, sheep, or pigs, of cake or other feeding stuff not produced on the holding," the following scale: —

"$\frac{1}{8}$th of the cost of linseed cake and meal, cotton cake and meal, rape cake, or malt culm, and $\frac{1}{6}$th of the cost of corn cake malt or other manufactured feeding stuffs of similar manurial value, which have been consumed on the farm during the last year of the tenancy, and $\frac{1}{6}$th of the cost of linseed cake and meal, cotton cake and meal, rape cake, or malt culm; and $\frac{1}{12}$th the cost of corn cake, malt or other manufactured feeding stuffs of similar manurial value which have been consumed on the farm during the year preceding the last year of the tenancy, and providing that the quantity allowed for straw do not exceed the average of the two next preceding years. For hay, straw, roots, and pulse purchased, $\frac{1}{4}$th of the last year's consumption, and for corn $\frac{1}{6}$th."

The Central Chamber recommended no scale applicable to other improvements for general adoption. The scales recommended by the District Chambers, and much more the above scale where applicable, will, it is conceived, be considered by arbitrators to be primâ facie fair and reasonable.

A substituted compensation has the advantage of comparative certainty, and is probably more for the advantage of the tenant than the landlord. The compensation under the act is more liable to reduction than increase from unforeseen causes, and is probably more for the advantage of the landlord than the tenant.

RECOVERY OF THE PREMISES BY THE LANDLORD.

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Sect. 1. — *By Peaceable Re-entry.*

Upon the determination of contract of tenancy, whether by effluxion of time, forfeiture, or in any other man- [*787] ner (see Ch. viii.), the demised * premises belong to the landlord, who may resume possession of them, subject, in the case of proceeding for a forfeiture caused otherwise than by non-payment of rent (see ante, p. 329), to notice to the tenant beforehand, and to the tenant obtaining "relief against forfeiture" afterwards, without any process of law whatever (*a*). This resumption should in all cases be peaceable, for if it be not, the landlord subjects himself to an indictment for forcible re-entry (*b*).[1] But even if the resumption should not be peaceable, the landlord, if his right to resume were good, cannot be sued by the tenant, except in respect of some personal damage done in the course of the

(*a*) Taylor *v.* Cole, 3 T. R. 292.

(*b*) *Post*, ch. xxiii., sect. 5.

[1] **The right of peaceable re-entry in America.** — The right of an owner entitled to immediate possession to use such force as will not constitute or provoke a breach of the peace to gain it, without liability, either civilly or criminally, is recognized in the majority of the American states. See *ante*, ch. 20, sec. 1, notes; and *post*, ch. 23, sec. 5, notes. The main difficulty is to measure the degree allowable. In some states it is held that actual physical force may be used, such as could be justified under the plea of *molliter manus imposuit* without *civil* liability. There have been some intimations by several judges of high standing that such force would not render the party using it criminally liable. This doctrine (as to criminal liability), however, if admitted at all, must be taken with the utmost care, and only relied upon after a careful examination of the local decisions.

In several states there are special statutes which prohibit the use of even constructive force. See next note, subtitle (*e*), "Peculiar statutes in some of the American states."

entry (*c*). In some cases, no doubt, peaceable re-entry (which is believed to be rare in practice) may be the proper remedy for a landlord to adopt, but if the re-entry be for forfeiture, relief to the tenant may be granted just as much after a peaceable re-entry as after re-entry by action (*d*); and in the majority of cases it will be desirable for the landlord to perfect his legal title by obtaining a writ of possession.[1]

(*c*) *Ante*, ch. xx., sect. 1.

(*d*) The words of sect. 14, sub-s. 2 of the Conveyancing Act (*ante*, p. 329), are, "where the lessor is proceeding by action *or otherwise*."

[1] **Proceedings for the recovery of demised premises in America.** — (*a*) *Remedies at common law.* — There are two classes of remedies at common law; to wit, real actions proper (such as ejectment and writs of entry) and summary proceedings, sometimes called process of forcible entry and detainer.

(*b*) *Under the codes these still exist in substance* (1 Estee's Pleadings (3d ed.), sec. 199; Bliss on Code Pleading (2d ed.), sec. 6); and though remedies for private injuries and suits upon contracts are all now included in one form of action, called a "civil action," yet the distinctions in nature still exist as much as ever they did.

The nature of such actions is of course materially modified under the codes by the abolition of legal fictions and introduction of equitable principles.

(*c*) *Real actions.* — Actions of ejectment at common law, or in nature of a real action under the codes (Doe *d.* Mayor &c. St. John *v.* Roe, 24 N. B. 357; McNair *v.* Schwarz, 16 Ill. 24, 25 (*per* Treat, C. J.); Jackson *v.* Parkhurst, 5 Johns. (N. Y.) 128; Johnson *v.* M'Leod, 12 Id. 182; Jackson *v.* Baker, 10 Id. 270; Collins *v.* Hasbrouck, 56 N. Y. 157; Preston *v.* Hawley, 101 N. Y. 586, 590 (*per* Ruger, Ch. J.); McCarthy *v.* Yale, 39 Cal. 586; Martin *v.* Splivale, 56 Cal. 128, 129 (*per* McKee, J.)), or writs of entry in Maine and Massachusetts, and perhaps in some other states (Larrabee *v.* Lumbert, 34 Me. 79; Reed *v.* Reed, 48 Id. 388; Bryant *v.* Tucker, 19 Id. 383; Ware *v.* Wadleigh, 7 Id. 74; Bennock *v.* Whipple, 12 Id. 346; Currier *v.* Earl, 13 Id. 216; Kelly, 23 Id. 192; Goodenow *v.* Pike, 24 Id. 425), are sometimes used to recover lands held under a terminated demise, and are the more usual remedies to recover possession of lands not held under tenancies, nor otherwise within the statutes of forcible entry and detainer.

(*d*) *Forcible entry and detainer and other summary proceedings; general rule as to degree of force.* — The proceedings for the summary recovery of land are called, in some states, proceedings for forcible entry and detainer; and in others, summary proceedings. The first expression is the more historical, but the latter is more accurate. The process of forcible entry and detainer was originally what the expression (taking the term "forcible" in its technical meaning) actually meant; to wit, process for the recovery of lands entered or detained by such force as to constitute a breach of the peace. It "was authorized only where the entry or holding was by force and violence, or threats of violence, sufficient to deter the owner from entering." *Per* Kent, J., in Dunning *v.* Finson, 46 Me. 550. The context of language and the scope of these statutes were sufficient to thus limit the definition of the term "forcible," and so it has always been held to be limited, not only in England,

but by the weight of authority in America, the rule of evidence (see *per* Cowen, J., in Willard *v.* Warren, 17 Wend. (N. Y.) 257, 261) being the same on both the criminal and civil side, and the proceedings themselves usually *quasi* civil and *quasi* criminal. Commonwealth *v.* Dudley, 10 Mass. 403, 409; Commonwealth *v.* Rees, 2 Brewst. (Pa.) 564, 565 (*per* Brewst., J.); The People *v.* Rickert, 8 Cow. 226, 232 (*per* Savage, Ch. J.); Commonwealth *v.* Conway, 1 Brewst. 509; Pennsylvania *v.* Robinson, Add. (Pa.) 14, 17 (see *per* Pres. Addison); Pennsylvania *v.* Waddle, Id. 41, 42; Foster *v.* Kelsey, 36 Vt. 199, 202; Hendrickson *v.* Hendrickson, 12 N. J. L. 202; Brick *v.* Middleton, 12 Id. 266; The People *v.* Smith, 24 Barb. (N. Y.) 16; Greer *v.* Wroe, 1 Sneed (Tenn.) 246; Botts *v.* Armstrong, 8 Porter (Ala.) 57, 61, 62 (*per* Ormon, J.); Commonwealth *v.* Shattuck, 4 Cush. (Mass.) 141; Pike *v.* Witt, 104 Mass. 595; Gray *v.* Finch, 23 Conn. 495; Merrill *v.* Forbes, 23 Cal. 379; Polack *v.* McGrath, 25 Cal. 54; Hopkins *v.* Calloway, 3 Sneed (Tenn.) 11; McMinn *v.* Bliss, 31 Cal. 122; Hodgkins *v.* Jordan, 29 Cal. 577; Frazier *v.* Hastler, 5 Cal. 156; Hildreth *v.* Camp, 41 N. J. L. 306, 308. By the above cases it is held that a mere trespass is not sufficient to constitute the offence of forcible entry.

It is *usually* held that force only sufficient to constitute a mere trespass, though followed by occupancy under claim of right, is not sufficient.

The degree of force essential to constitute this offence, and to distinguish it from a mere trespass, varies somewhat in the different states. See *post*, ch. 23, sec. 5, notes.

(*e*) *Peculiar statutes in some of the American states.* — By an extension of the provisions of the original statutes of forcible entry and detainer in several states, peaceable entries, if against the will of the occupants, have been forbidden; and restitution will be granted in such cases in those states, even to a wrongful occupant, as against an owner entitled to possession, though the latter use no actual force in gaining the possession.

This is the law in Kentucky. — Civil Code, sec. 452 (500); Swartswelder *v.* U. S. Bank, 1 J. J. Marsh. 38, 44; Henry *v.* Clark, 4 Bibb, 426; Chiles *v.* Stephens, 3 A. K. Marsh. 340, 344. Justice Owsley in the last-cited case said, "To entitle Stephens to restitution it was incumbent on him barely to prove that at the time of 'the entry' he was, in fact, possessed, and that their entry was without his assent."

In Missouri it is provided (by sec. 2418, Code of Procedure) that no entry shall be made except "in a peaceable manner;" and though the definition of forcible entry and detainer (sec. 2419) seems to imply force constituting a breach of the peace, yet it is thereafter provided (sec. 2433) that the complainant shall not be required to give further proof of "the forcible entry or detainer than that he was lawfully possessed . . . and that the defendant unlawfully entered," etc.

The courts in Missouri have decided that "lawfully possessed" means "peaceably possessed" (*per* Scott, J., in Krevet *v.* Meyer, 24 Mo. 107, 110), and that an entry against the will of the occupant is sufficient to constitute the offence (Dilworth *v.* Fee, 52 Mo. 130; King's Adm'r *v.* St. Louis Gas Light Co., 34 Mo. 34; Spalding *v.* Mayhall, 27 Mo. 377 (entry by key surreptitiously obtained); Wunsch *v.* Gretel, 26 Mo. 580; Dennison *v.* Smith, Id. 487, 488 (*per* Napton, J., quoting from the statute); Cathcart *v.* Walter, 14 Id. 17; Warren *v.* Ritter, 11 Mo. 354, 356). There can be no conviction, however, unless a *bona fide* actual possession on the part of the complainant is shown. Keene *v.* Schnedler, 9 Mo. App. 597.

In Illinois it is provided, in 1 Rev. Sts. ch. 57, sec. 1, that "no person shall make an entry . . . with force," nor in any but "a peaceable manner."

In sec. 2, which provides a purely civil remedy (Robinson *v.* Crummer, 10 Ill. 218), it is said, among other things, that a person may be restored to possession when "a forcible entry" has been made. Taking these two sections together, it has been repeatedly held that a person might be restored to possession, though the force used was merely constructive. Atkinson *v.* Lester, 1 Scam. 407; Baker *v.* Hays, 28 Ill. 387 (a case of clandestine entry); Smith *v.* Hoag, 45 Ill. 250, 251. In Croff *v.* Ballinger, 18 Ill. 200, 203, Skinner, J., said, "The word 'force' . . . means no more than the term *vi et armis* does at common law," etc. Cited and approved by Walker, J., in Smith *v.* Hoag, *supra*.

These cases and this definition, however, are badly shaken by what was said by Mulkey, C. J., in Fort Dearborn Lodge *v.* Klein, 115 Ill. 177, 191; to wit, "The word 'force' as here used means *actual* force as contradistinguished from implied force."

(*f*) *The provisions providing remedies for landlords.* — These provisions were subsequent additions to the original statutes of forcible entry and detainer, which, as before stated, included originally only forcible entries and forcible detainers.

(*g*) *Title not in issue.* — The title to the premises is not in issue in these proceedings, either when brought by a landlord at termination of a tenancy, or against one who has forcibly entered upon or detained the premises. Iron Mountain & Helena R. R. *v.* Johnson, 119 U. S. 608; Vess *v.* The State, 93 Ind. 211, 215; Settle *v.* Hanson, 1 Morris (Iowa), 150, 152; Black *v.* The State, 3 Yerg. (Tenn.) 588; The People *v.* Leonard, 11 Johns. (N. Y.) 504; The People *v.* Van Nostrand, 9 Wend. (N. Y.) 50; The People *v.* Field, 52 Barb. (N. Y.) 198; The People *v.* Rickert, 8 Cow. (N. Y.) 226; Shondy *v.* School District, 32 Ill. 290; Lecatt *v.* Stewart, 2 Stew. (Ala.) 474; Smith *v.* Hoag, 45 Ill. 250; Spalding *v.* Mayhall, 27 Mo. 377; Gibson *v.* Tong, 29 Id. 133; Youngs *v.* Freeman, 15 N. J. L. 30; Mercereau *v.* Bergen, Id. 244; Clark *v.* Stringfellow, 4 Ala. 353; Stone *v.* Malot, 7 Mo. 158; Beeler *v.* Cardwell, 33 Mo. 84; Dutton *v.* Tracy, 4 Conn. 79. The above cases decide that the plea of *liberum tenementum* is no defence; and possession will be restored under this process to an actual occupant under claim of right, even though the defendant be the owner of the premises, and have the legal right to the immediate possession.

(*h*) *Possession is essential where the plaintiff founds his right to recover on the forcible entry of the defendant.* — He must show that he was in actual possession of the premises at the time of the entry. Hopkins *v.* Calloway, 3 Sneed (Tenn.) 11; Phelps *v.* Baldwin, 17 Conn. 209; Mairs *v.* Sparks, 5 N. J. L. 513; Childress *v.* McGehee, Minors (Ala.) 131; Wright *v.* Mullens, 2 Stew. & P. (Ala.) 219; Smith *v.* Hoag, 45 Ill. 250; Pitman *v.* Davis, Hemp. 29; Cummins *v.* Scott, 23 Cal. 526.

It has been sometimes held that casual absence does not destroy a possession otherwise sufficient (Holmes *v.* Holloway, 21 Tex. 658; Barker *v.* Hayes, 28 Ill. 387; Davidson *v.* Phillips, 9 Yerg. (Tenn.) 93; Mason *v.* Powell, 38 N. J. L. 576; Jarvis *v.* Hamilton, 19 Wis. 187); and possession maintained by family or servants of occupant is sufficient (State *v.* Pollock, 4 Iredell (N. C.) L. 305; State *v.* Walker, 10 Id. 234, 235; State *v.* Shepard, 82 N. C. 614; State *v.* Caldwell, 2 Jones (N. C.) L. 468).

The possession of a mere trespasser in temporary occupation, without claim of right, is not sufficient (The People *v.* Field, 52 Barb. (N. Y.) 198, 211); but the possession of a trespasser who had occupied for a week under a claim of right was held sufficient in State *v.* Pollock, 4 Iredell (N. C.) L. 305.

SECT. 2. — *By Proceedings in the High Court.*

(a) *Generally.*

Recovery of land. — Land, being different in its legal nature from other property, has always been recoverable by a process different from the ordinary process of law.

Former action of ejectment. — The proceeding was known technically, and is still known popularly, as an action of ejectment. The details of this action were formerly very cumbrous, and were based upon a legal fiction of a demise to a fancied person, John Doe; this has been now for more than thirty years abolished, but the name "ejectment" and a certain distinction between it and other actions, the most conspicuous of which was the absence of pleadings, were maintained until the Judicature Acts came into force in 1875.

Present action. — Under those acts the name has disappeared, and is replaced by the term, "Action for the recovery of land." This action, when brought in a High Court of Justice, follows in its details for the most part the ordinary course of an action in that Court.

(*i*) *Mode of proceeding by landlord to recover possession summarily.* — More usually the landlord cannot proceed until he has first made written demand upon the tenant for the possession in accordance with the statute. In some states this is not necessary if the tenancy has been otherwise terminated.

In many states a written notice to quit, itself terminating the tenancy, is a sufficient foundation for the proceedings without the necessity of another and subsequent written demand. In some states a second notice is necessary.

For example, a lessor at will in California, in order to maintain a summary proceeding for unlawful detainer against his tenant, must first give him thirty days' notice to quit, and afterward a three days' written demand for possession. Civil Code, sec. 791, 792; Code Civil Procedure, secs. 1159–1175. For forms and law affecting California and other states having similar statutes, see 2 Estee's Pleadings (3d ed.), secs. 2921–2968.

In Pennsylvania three months' notice is required (at least if the tenancy is from year to year) (Act of March 21, 1772, 2 Purdon's Digest, pp. 1015 *et seq.*); but this notice need not be in writing (Wilgus *v.* Whitehead, 89 Pa. St. 131, 134 (*per* Trunkey, J.)). It seems that but one notice is necessary; and, in case the lease expires at a definite time, the notice may be given after the lease has expired. Logan *v.* Herron, 8 S. & R. 459. In case of a tenancy from year to year, the notice must expire with the year. Lesley *v.* Randolph, 4 Rawle, 123.

(b) *Special Proceedings under Common Law Procedure Act.*

Special procedure in case of non-payment of rent. — The Common Law Procedure Act, 1852, sect. 210, provides that the landlord, where one half-year's rent is in arrear, and the landlord * has a right to re-enter for non-pay- [*788] ment, may serve a writ of ejectment without any formal demand. The cases on this section, which amongst sections 208 to 220, in pari materiâ, is expressly saved from the sweeping repeals of the Common Law Procedure Acts effected by the Statute Law Revision and Civil Procedure Act, 1883 (46 & 47 Viet. c. 49), and the provisions as to relief against forfeiture, have been already noticed (*e*). It should be added here, that the section provides that "in case of judgment against the defendant for non-appearance, if it appear to the court by affidavit, or be proved upon the trial, in case the defendant appears," that half-a-year's rent was due before the writ was served, that no sufficient distress was found, and that the landlord had power to re-enter, then the landlord may recover judgment as if the rent had been legally demanded.

The 213th section of the Common Law Procedure Act, 1852, provides a special procedure for ejecting a tenant holding over after the expiration of a tenancy, the contract for which was made in writing. This section is practically superseded by Order III., Rule 6, and Order XIV., which provide a still more expeditious procedure, and are not confined to tenancies contracted for in writing. The section, which is not only repealed but expressly saved from repeal by the Statute Law Revision and Civil Procedure Act, 1883, as above mentioned, is as follows (*f*): —

Proceedings against tenant holding over. Notice to tenant holding over requiring him to find bail. — "Where the term or interest of any tenant now or hereafter holding under

(*e*) *Ante*, 319, 331.

(*f*) The reason for the non-repeal of the section is conceived to have been that Order III., Rule 6, and Order XIV. may be altered or annulled by the Rule Committee of the Judges of the Supreme Court. The cases upon this section illustrate the rules, but otherwise, except in the unlikely event of the rules being annulled, the section and the cases upon it may be disregarded.

a lease or agreement in writing any lands, tenements or hereditaments for any term or number of years certain, or from year to year, shall have expired, or been determined either by the landlord or tenant by a regular notice to quit, and such tenant, or any one holding or claiming by or under him, shall refuse to deliver up possession accordingly, after lawful demand in writing made and signed by the landlord or his agent, and served personally upon, or left at the dwelling-house or usual place of abode of such tenant or person, and the landlord shall thereupon proceed by action [*of ejectment*] for the recovery of possession, it shall be lawful for him, at the foot of the writ [*in ejectment*], to address a notice to such tenant or person, requiring him to find bail, if ordered by the court or a judge, and for such purposes as are hereinafter next specified; and upon the appearance of the party, or an affidavit of service of the writ and notice, it shall be lawful for the landlord, producing the lease or agreement, or some counterpart or duplicate thereof, and [*789] proving the execution of * the same by affidavit, and upon affidavit that the premises have been actually enjoyed under such lease or agreement, and that the interest of the tenant has expired or been determined by regular notice to quit, as the case may be, and that possession has been lawfully demanded in manner aforesaid, to move the court, or apply by summons to a judge at chambers, for a rule or summons for such tenant or person to show cause within a time to be fixed by the court or judge on a consideration of the situation of the premises, why such tenant or person should not enter into a recognizance by himself and two sufficient sureties in a reasonable sum, conditioned to pay the costs and damages which shall be recovered by the claimants in the action: and it shall be lawful for the court or judge, upon cause shown, or upon affidavit of the service of the rule or summons, in case no cause should be shown, to make the same absolute in the whole or in part, and to order such tenant or person, within a time to be fixed upon a consideration of all the circumstances, to find such bail, with such conditions and in such manner as shall be specified in the said rule or summons, or such part of the same so made absolute; and

in case the party shall neglect or refuse so to do, and shall lay no ground to induce the court or judge to enlarge the time for obeying the same, then the lessor or landlord filing an affidavit that such rule or order has been made and served, and not complied with, shall be at liberty to sign judgment for recovery of possession and costs of suit [*in the form contained in the schedule (A) to this Act annexed, marked* 21, *or to the like effect*]" (*h*).

Defendant must not claim under distinct title. — This enactment does not apply where the defendant bonâ fide claims to hold possession, not as the claimant's tenant but under some distinct title, and makes an affidavit of such title in answer to the application (*i*).

There must be a lease or agreement in writing, for a term certain, or from year to year. — It must be observed that to entitle a landlord to proceed under this section there must be a lease or agreement in writing under which the defendant held till the term ended, or was duly determined by a regular notice to quit; and the tenancy must have been for a term or number of years certain, or from year to year. A quarterly tenancy is not sufficient (*k*); nor a tenancy for years determinable on lives (*l*); nor a lease for fourteen years, determined at the end of the first seven years by a six months' previous notice pursuant to a proviso therein contained (*m*). Further, the term must have expired, or been determined by a regular notice to quit; and it is not sufficient that the * term has become forfeited [*790] and determined for non-performance of covenants or conditions.

Demand of possession. — There must also have been a lawful demand in writing of possession made and signed by the

(*h*) For forms of proceedings under this enactment, see Cole Ejec. 298, 702, 717—722; Chit. Forms, 564—573 (9th ed.).

(*i*) Doe *d.* Sanders *v.* Roe, 1 Dowl. 4.

(*k*) Doe *d.* Carter *v.* Roe, 10 M. & W. 670; 2 Dowl. N. S. 449; 12 L. J. Ex. 27.

(*l*) Doe *d.* Pemberton *v.* Roe 7 B. & C. 2.

(*m*) See Doe *d.* Cardigan *v.* Roe, 1 D. & R. 540, decided under the former act, 1 Geo. 4, c. 37.

landlord or his agent (*n*). But the usual notice to quit may of itself be a sufficient demand to satisfy the statute (*o*).

Refusal to deliver up. — It must be served as directed by the act, and if possible an express refusal to deliver up possession should be obtained; otherwise it may be difficult to satisfy the court or a judge that there has been such a refusal.

Writ of ejectment, with notice for bail. — After a sufficient refusal (express or to be implied) has been obtained, a writ in the ordinary form may be issued, but with a *notice at the foot* addressed to the defendant, requiring him, if ordered by the court or a judge, to give bail by himself and two sufficient sureties, conditioned to pay the costs and damages which shall be recovered in the action.

Service of writ. — Such writ must be served in the usual manner.

Judgment by default. — If the defendant do not appear, final judgment may be signed and execution issued in the usual manner.

Upon appearance, application for bail. — When the defendant appears, an application should be made to the court, or to a judge at chambers, founded upon a sufficient affidavit, to compel the defendant to enter into a recognizance with two sureties, pursuant to the statute. The notice of motion or summons must be served in the usual manner, and an affidavit of service made.

On hearing of application, sum and time fixed. — Upon the hearing of such motion or summons, the court or judge will fix the sum and time "upon a consideration of all the circumstances" (*p*).

Usual amount of bail. — A sum equal to one year's value of the premises, with a reasonable sum for costs (about 40*l.*) (*q*), is usually required; but not a sum to cover the mesne profits (*r*). The amount will not be increased by reason of any

(*n*) Form, Appendix (C), No. 10.
(*o*) Wilkinson *v.* Colley, 5 Burr. 2694, 2698; Hirst *v.* Horn, 6 M. & W. 393.
(*p*) Doe *d.* Marquis of Anglesea *v.* Brown, 2 D. & R. 688; Cole Ejec. 384.
(*q*) Doe *d.* Levy *v.* Roe, 6 C. B. 272.
(*r*) Doe *d.* Sampson *v.* Roe, 6 Moo. 54.

dilapidations, or of any damage done to the business by shutting up the premises or the like (*s*).

Recognizance. — A recognizance (when ordered) must be entered into by the defendant, with two sufficient sureties, in the usual manner (*t*).

Affidavit of caption. — If taken before a commissioner in the country, there must be an affidavit of caption (*u*).

Recognizance to be filed. — The recognizance and affidavit must be filed with one of the masters (*x*). Notice thereof must be given forthwith (*y*). The bail may be excepted to and compelled to justify, as in other cases.

Judgment for want of bail. — After the time, or the enlarged time (if any), allowed by the order for putting in bail has elapsed, "the lessor or landlord filing an affidavit that such [*rule or*] order has been made and served and not *complied with (*z*), shall be at liberty to sign judg- [*791] ment for recovery of possession and costs of suit in the form contained in [*Schedule (A) to this act annexed, No.* 21, *or to the like effect*]" (*z*).

Proceeding after bail put in and completed. — If the recognizance be filed and completed in due time, the plaintiff should proceed to trial in the usual manner. He should take care to be prepared to prove at the trial (*inter alia*) the service of notice of trial, and the amount of mesne profits to which he is entitled.

No stay of judgment and execution except on condition, unless, &c. — If a verdict be found for the plaintiff, the judge will not order a stay of judgment or execution (to allow of an application for a new trial), except on condition that within four days from the day of the trial the defendant shall actually find security by a recognizance with two sureties not to commit waste, &c. (*a*), unless it appear to the judge that the verdict was contrary to the evidence, or the damages

(*s*) Doe *d.* Marks *v.* Roe, 6 D. & L. 87; Doe *d.* Levy *v.* Roe, 6 C. B. 272.

(*t*) Cole Ejec. 385; see form, Id. 719.

(*u*) See form, Cole Ejec. 720.

(*x*) 15 & 16 Vict. c. 76, s. 216.

(*y*) See form, Cole Ejec. 722.

(*z*) See the form, Cole Ejec. 722; Chit. Forms, 569.

(*a*) 15 & 16 Vict. c. 76, 215.

given were excessive; nor will execution be stayed by appeal without a recognizance pursuant to sect. 208 (*b*).

Recovery of mesne profits. — By the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), s. 214, "Whenever it shall appear on the trial of any ejectment at the suit of a landlord against a tenant that such tenant or his attorney hath been served with due notice of trial, the judge before whom such cause shall come on to be tried shall, whether the defendant shall appear upon such trial or not, permit the claimant on the trial, *after proof of his right to recover possession* of the whole or any part of the premises mentioned in the writ in ejectment, to go into *evidence of the mesne profits thereof* which shall or might have accrued from the day of the expiration or determination of the tenant's interest in the same down to the time of the verdict given in the cause, or to some preceding day to be specially mentioned therein; and the jury on the trial finding for the claimant, shall in such case give their verdict upon the whole matter, both as to the recovery of the whole or any part of the premises, and also as to the amount of damages to be paid for such mesne profits; and in such case the landlord shall have judgment within the time hereinbefore provided, not only for the recovery of possession and costs, but also for the mesne profits found by the jury: provided always, that nothing hereinbefore contained shall be construed to bar any such landlord from bringing any action for the mesne profits which shall accrue from the verdict, or the day so specified therein, down to the day of the delivery of possession of the premises recovered in the ejectment." This section applies to all actions of ejectment as between landlord and tenant, and is not confined to cases in which security has been given, pursuant to sect. 213. Mesne profits may be recovered under sect. 214, although the writ and issue do not contain any claim in respect of them (*c*).

[*792] * **Proof of notice of trial.** — If the tenant appear at the trial, that of itself amounts to sufficient proof

(*b*) Roe *d.* Durrant *v.* Moore, 7 Bing. 124; 1 Dowl. 203.

(*c*) Smith *v.* Tett, 9 Exch. 307.

that due notice of trial had been given, and no further evidence on that point is necessary (*d*).

Optional to proceed under sect. 214, or otherwise. — It is optional with the landlord to proceed for mesne profits under this section, or to bring a subsequent action of trespass for mesne profits, &c., or for double value or double rent (*e*). But where bail has been put in, pursuant to sect. 213, the recognizance is conditioned "to pay the costs *and damages* which shall be recovered by the claimant in the action;" and this will of course include any damages recovered in the ejectment in respect of mesne profits (*f*).

Security to be given against waste, &c., if execution stayed. — By sect. 215, "in all cases in which such security shall be given as aforesaid (*g*), if upon the trial a verdict shall pass for the claimant, unless it shall appear to the judge before whom the same shall have been had, that the finding of the jury was contrary to the evidence, or that the damages given were excessive, such judge shall not, except by consent, make any order to stay judgment or execution, except on condition that within four days from the day of the trial, the defendant shall actually find security by the recognizance of himself and two sufficient sureties, in such reasonable sum as the judge shall direct, conditioned not to commit any waste, or act in the nature of waste, or other wilful damage, and not to sell or carry off any standing crops, hay, straw or manure produced or made (if any) upon the premises, and which may happen to be thereupon, from the day on which the verdict shall have been given to the day on which execution shall finally be made upon the judgment, or the same be set aside, as the case may be: provided always, that the recognizance last above mentioned shall immediately stand discharged and be of no effect, in case proceedings in error shall be brought upon such judgment, and the plaintiff in error shall become bound in the manner hereinbefore provided" (*h*).

(*d*) Doe *d.* Thompson *v.* Hodgson, 2 Moo. & R. 283; 12 A. & E. 135; Cole Ejec. 292, 388.

(*e*) 15 & 16 Vict. c. 76, s. 218.

(*f*) Cole Ejec. 388.

(*g*) Sect. 213, *ante*, 788.

(*h*) Sect. 208. Proceedings in error are now abolished (R. S. C. Ord. LVIII. r. 1), but it is conceived that

An order to stay judgment or execution without any such condition may be made in the following cases: — 1. Where it appears to the judge that the finding of the jury was contrary to the evidence. 2. Where it appears to the judge that the damages given were excessive. 3. By consent (*i*).

When order made under sect. 216. — By sect. 216, "all recognizances and securities entered into as last aforesaid may and shall be taken respectively in such manner, and by and before such persons as are provided and author-
[*793] ized in respect of *recognizance of bail upon actions and suits depending in the court in which any such action of ejectment shall have been commenced (*k*): and the officer of the same court, with whom recognizances of bail are filed, shall file such recognizances and securities, for which respectively the sum of two shillings and sixpence, and no more, shall be paid; but no action or other proceeding shall be commenced upon any such recognizance or security after the expiration of six months from the time when possession of the premises, or any part thereof, shall actually have been delivered to the landlord."

Order to stay, &c., and proceedings thereon. — The order to stay, &c., whether made with or without the above mentioned "condition," should be drawn up and served forthwith. And if a recognizance be ordered, the defendant should take care to enter into one, with two sufficient sureties, within four days after the verdict, *exclusive* of the day of trial. It seems that notice of such recognizance should be given forthwith, and that the sureties may be compelled to justify in like manner as where a tenant is ordered to find bail before being permitted to defend (*l*).

Former procedure when right accrued after certain terms. — By sect. 217, a special procedure was provided where the right of re-entry accrued in or after Hilary or Trinity Terms. The section is as follows: "In all actions of ejectment hereafter to be brought in any of her Majesty's Courts at West-

the last paragraph of sect. 215 will be in force in case of appeal.

(*i*) For form of order, see Cole Ejec. 776.

(*k*) See 32 & 33 Vict. c. 38.

(*l*) Cole Ejec. 389.

minster, by any landlord against his tenant, or against any person claiming through or under such tenant, for the recovery of any lands or hereditaments in any county, except London or Middlesex, where the tenancy shall expire, or the right of entry into or upon such lands or hereditaments shall accrue to such landlord in or after Hilary or Trinity [*Terms*] respectively, it shall be lawful for the claimant in any such action, at any time within ten days after such tenancy shall expire, or right of entry accrue as aforesaid, to serve a writ in ejectment in the form contained in the schedule (A) to this act annexed, marked No. 13, except that it shall command the persons to whom it is directed to appear within ten days after service thereof, in the court in which such action may be brought; and the like proceedings shall be thereupon had as hereinbefore provided, save that it shall be sufficient to give at least six clear days' notice of trial to the defendant before the commission day of the assizes at which such ejectment is intended to be tried: and any defendant in such action may, at any time *before* the trial thereof, apply to a judge by summons to stay or set aside the proceedings, or to postpone the trial until the next assizes: and it shall be lawful for the judge, in his discretion, to make such order in the said cause as to him shall seem expedient." It would probably be held, since the decision in The Governors of Christ's College *v.* Martin (*m*), that *the old terms [*794] subsist for the purposes of this enactment; and that a landlord may avail himself of the provisions of the section so far as they can be considered as still in force and of advantage to him. The obligation on the tenant to appear within ten days may be taken to be at an end, as in all cases now the appearance of a defendant must be in eight days (*n*).

Object of sect. 217. — The object of this enactment is to enable landlords to proceed to trial at the ensuing assizes, and to prevent tenants and persons claiming through or under them, from wrongfully holding over until the second assizes, which, but for this section, they might do in many cases.

(*m*) 36 L. T. 537.

(*n*) R. S. C., Ord. II., r. 3; Appendix (A), Part I., No. 1.

When applicable. — The section applies not only where the tenancy has expired or been duly determined by a notice to quit, but also to cases where a right of entry has first accrued under the proviso for re-entry for non-performance of any covenant or agreement on some day in or after Hilary or Trinity Sittings (*o*).

Form of writ under sect. 217. — The writ is in the usual form, except that it directs the defendants to appear within eight days after service thereof.

Service thereof. — It must not only be issued, but also served within eight days after the tenancy has expired, or the right of entry first accrued, otherwise the writ, or the service thereof (as the case may be), will be irregular (*p*).

Application to set aside the writ, or the service. — But the application to set it aside must, as in other cases of irregularity, be made promptly (*q*), and must be supported by an affidavit showing specially when the tenancy expired, or the right of entry accrued, and when the writ was issued, and when the copy was served. It cannot be objected at nisi prius that the action was not commenced within eight days after the right of entry accrued, that being merely matter of *irregularity* (*r*).

Process on appearance. — If the defendant appear, the proceedings to trial are the same as in other cases, except that "at least six clear days' notice of trial" must be given, i.e. *exclusive* both of the day of notice and of the commission day. The want of sufficient, or indeed of any, notice of trial will be waived if the defendant appear at the trial, and take his chance of the verdict (*s*). It is not necessary to prove at the trial that notice of trial has been given, unless the plaintiff seeks to recover mesne profits in the ejectment (*t*).

(*o*) Doe *d.* Antrobus *v.* Jepson, 3 B. & Adol. 402; Doe *d.* Rankin *v.* Brindley, 4 B. & Adol. 84.

(*p*) Doe *d.* Rankin *v.* Brindley, *supra.*

(*q*) Cole Ejec. 390; Reg. Prac. H. T. 1853, Nos. 135, 136.

(*r*) Doe *d.* Rankin *v.* Brindley, *supra.*

(*s*) Doe *d.* Antrobus *v.* Jepson, *supra.*

(*t*) Doe *d.* Antrobus *v.* Jepson, *supra.*

(b) *Special Proceedings, under Order XIV., against Tenant Holding Over.*

The Rules of the Supreme Court, 1883 (Order III., Rule 6, and Order XIV.), provide a summary and expeditious procedure, first * introduced in 1883, and superseding the procedure under sect. 213 of the Common Law Procedure Act, 1883, above mentioned, for recovery of the demised premises from a tenant holding over. [*795]

Special indorsement of writ against tenant holding over. — By Order III., Rule 6, "In actions for the recovery of land, with or without a claim for rent or mesne profits, by a landlord against a tenant whose term has expired or has been duly determined by notice to quit, or against persons claiming under such tenant, the writ of summons may, at the option of the plaintiff, be specially indorsed with a statement of his claim," and "such special indorsement shall be to the effect of such of the forms in Appendix C., sect. 4, as shall be applicable to the case."

Application for final judgment. — By Order XIV., "Where the defendant appears to a writ of summons specially indorsed under Order III., Rule 6, the plaintiff may on affidavit made by himself or by any other person who can swear positively to the facts, verifying the cause of action and the amount claimed, if any, and swearing that in his belief there is no defence to the action, apply to a judge for liberty to enter final judgment for recovery of the land (with or without rent or mesne profits, as the case may be, and costs). The judge may thereupon, unless the defendant by affidavit or otherwise shall satisfy him that he has a good defence to the action on the merits, or disclose such facts as may be deemed sufficient to entitle him to defend, make an order empowering the plaintiff to enter judgment accordingly."

By Rule 2 of Order XIV. the application for leave to sign final judgment must be made by summons returnable not less than four clear days after service, accompanied by a copy of the affidavit and exhibits referred to therein. By Rule 3, the defendant may show cause against the application

by affidavit, stating whether the defence goes to the whole or to part only of the claim, and the judge may order the defendant to attend and to be examined upon oath or to produce any leases or other documents. By Rule 4, judgment may be given for part of the claim, and by Rule 5, against one defendant only without prejudice to a right of action against others.

Leave to defend. — By Rule 6, leave to defend may be given unconditionally or on terms as the judge may think fit. By Order XIV., Rule 7 (Rule 5 of the "Rules of the Supreme Court, December, 1885"), the court or a judge may, with the consent of all parties, dispose of the action finally and without appeal in a summary manner, and on such terms as to costs or otherwise as the court or judge shall think just.

Appeals. — By Order LIV., Rules 21 and 24, there is an appeal from a master in chambers to a judge within four days, and from either a master or judge to a Divisional Court within eight days after the decision appealed against. By Order LVIII., Rule 15, orders under Order XIV. having been held to be interlocutory (*u*), there is an appeal to the Court of Appeal within twenty-one days, or by special leave of the court, within a further time.

[*796] * **To what cases the procedure applies.** — The procedure applies only to cases where a tenancy has been determined either by effluxion of time or by notice to quit, which notice may have been given either by the landlord or the tenant. It does not apply to a determination by forfeiture (*x*) or surrender (*y*), but it may apply to a contract of tenancy created between mortgagor and mortgagee and determined by the mortgagee (*z*).

(c) *Proceeding by Ordinary Action.*

Ascertain clearly right of entry. — If Order XIV. should not apply, or if leave to defend should be given to the tenant

(*u*) Standard Discount Co. *v.* La Grange, L. R. 3 C. P. D. 67; Mansergh *v.* Rimmell, W. N. 1884, p. 34.

(*x*) See Cundley *v.* Sharpley, 15 M. & W. 558.

(*y*) See Doe *d.* Tindal *v.* Roe, 2 B. & Ad. 922.

(*z*) Daubuz *v.* Lavington, L. R. 13 Q. B. D. 347; 51 L. T. 206.

thereunder, the landlord will have to proceed by ordinary action, before commencing which the landlord should ascertain clearly that he has a right of entry, i.e. a legal right to actual possession of the property, and not merely a right to the reversion and its incidents, such as rent, &c. A mere breach of covenant is not sufficient to support an ejectment, unless the lease or agreement contains a proviso for re-entry applicable to such covenant, but the remedy is only by action for damages (*a*). Generally speaking, an ejectment cannot be maintained for non-payment of rent (notwithstanding a proviso for re-entry applicable thereto), unless half-a-year's rent or more is in arrear and there is no sufficient distress to be found on the demised premises countervailing all the arrears due (*b*), with the rent being demanded (*c*). But sometimes the lease expressly provides, that in case any rent shall be in arrear for a specified number of days (although no formal demand shall have been made thereof), it shall be lawful for the lessor to re-enter, &c. (*d*). Such words, or any others to the like effect, are sufficient to dispense with the necessity for a formal demand of the rent according to the strict rules of the common law (*e*).

Demand of possession before action. — Sometimes a demand of possession is necessary before an ejectment can be maintained (*f*), although the defendant is not entitled to the usual notice to quit. This happens when the defendant is, by construction of law or otherwise, a tenant at will to the plaintiff, and such tenancy has not been legally determined by entry or otherwise (*g*).

*** Notice, under Conveyancing Act, before proceeding for forfeiture.** — If the action be intended to be brought [*797] upon a forfeiture for a breach of covenant *other than the covenant to pay rent*, a notice must be served on the tenant and

(*a*) Lit. s. 325; Doe *d.* Wilson *v.* Phillips, 2 Bing. 13; Doe *d.* Dark *v.* Bowditch, 8 Q. B. 973.

(*b*) 15 & 16 Vict. c. 76, s. 210; Cross *v.* Jordan, 8 Exch. 149.

(*c*) Hill *v.* Kempshall, 7 C. B. 975.

(*d*) See 8 & 9 Vict. c. 124, Sched. 2, Col. 2, Form 11, *post*, Appendix A. Sect. 1.

(*e*) Doe *d.* Harris *v.* Masters, 2 B. & C. 490; Goodright *d.* Hare *v.* Cator, 2 Doug. 477, 486; Dormer's Case, Co. R., Pt. 5, 40 b; Cole Ejec. 411, 412.

(*f*) See form of such demand, *post*, Appendix C., Sect. 9; but it need not be in writing.

(*g*) Cole Ejec. 58.

other persons interested before bringing it. This very important condition is imposed by sect. 14, subs. (1), of the Conveyancing Act, 1881, 44 & 45 Vict. c. 41 (*h*), on the following terms: —

"A right of re-entry or forfeiture under any proviso or stipulation in a lease for a breach of any covenant or condition in the lease shall not be enforceable by action or otherwise, unless and until the lessor serves on the lessee a notice specifying the particular breach complained of, and if the breach is capable of remedy requiring the lessee to make compensation in money for the breach, and the lessee fails, within a reasonable time thereafter, to remedy the breach, if it is capable of remedy, and to make reasonable compensation in money, to the satisfaction of the lessor, for the breach."

Procedure as in other actions, with certain exceptions. — The procedure in an "action of ejectment," or, as it is now called, "an action for the recovery of land," is the same, for the most part, as that in use in ordinary actions. There are, however, some points in which this action is peculiar, and these will be duly noticed, and it may be well to call attention to some few details as to the writ under the old practice.

Writ to have names of defendants. — The writ should be directed to the persons in possession by name (*i*). The christian and surname or title of dignity (*k*) of each person in possession as *tenant or subtenant* of all or any part of the property claimed, should be correctly stated.

Effect of misnomer.— But the court, even under the old practice, refused to set aside the writ, or the copy and service, when the writ was faulty by reason only of a misnomer (*l*).

(*h*) See the section at length, *ante*, 392, ch. viii. s. 6, sub-s. (*b*), and see it for the definitions of lessee, &c., the manner of the service of the notice, &c.

(*i*) See the repealed s. 168 of the C. L. P. Act, 1852.

(*k*) Titles of dignity should be thus stated, viz.: The Most Noble A. Duke of B.; The Most Honorable C., Marquis of D.; the Right Honorable E., Earl of F.; The Right Honorable G., Viscount H.; The Right Honorable J., Baron K.; The Right Honorable L. M. [this is applicable to members of Her Majesty's Privy Council]; The Honorable N. O. [Sons of Peers]; Sir P. Q., Baronet; Sir R. S., Knight; and the like. The title or addition of M. P., or Esquire need not be given, but may sometimes be added by way of courtesy.

(*l*) Doe *d.* Stanton *v.* Roe, 6 M. &

Only tenants and subtenants in possession to be named. — Only persons in possession as tenants or subtenants should be named as defendants in the writ. Generally speaking, the occupation of a servant is considered as the occupation of his master by his servant (*m*). But the servant of a deceased tenant may so act as to render himself liable to be sued personally in an ejectment (*n*); and if he appear to the writ it will be no defence that he occupied merely as the servant of another person (*o*).

***Tenants who have sublet.** — If there be a tenant [*798] in possession who occupies by a subtenant, the former *may* be named in the writ as one of the defendants (*p*), but it is sufficient to name the subtenant, leaving him to give notice of the writ to his immediate landlord, pursuant to 15 & 16 Vict. c. 76, s. 209.

Vacant possession. — If the possession of the premises is *vacant*, the writ should be directed to the person who would have been tenant in possession if he had not abandoned the possession (*q*). If he be dead, the writ should be directed, not to him, but to his executors or administrators (*r*). If there be no rightful executor or administrator, an executor de son tort, *who has taken possession*, may be sued (*r*).

Description of the property. — The property claimed should be described in the writ with reasonable certainty (*s*), but a general description will usually be sufficient.

Indorsement of writ. — The form of indorsement given in the Rules of the Supreme Court is as follows: —

"The plaintiff's claim is to recover possession of a house, No. ——, in —— Street [*or of a farm called Blackacre*], situate in the parish of ——, in the county of —— (*t*)."

Parish and county. — The parish and county wherein the

& S. 203; Wells *v.* Ld. Suffield, 4 C. B. 750; 5 D. & L. 177.

(*m*) Becke *v.* Beaumont, 16 East, 33; Mayhew *v.* Suttle, 4 E. & B. 347.

(*n*) Doe *d.* Atkins *v.* Roe, 2 Chit. R. 179; Doe *d.* Cuff *v.* Stradling, 2 Stark. 537.

(*o*) Doe *d.* James *v.* Staunton, 2 B. & A. 371; 1 Chit. R. 143.

(*p*) Roe *v.* Whiggs, 2 Bos. & P., N. R. 330.

(*q*) Id. 85.

(*r*) Doe *d.* Crouch *v.* Roe, 13 L. J., Q. B. 80; Doe *d.* Pamphilon *v.* Roe, 1 Dowl., N. S. 186.

(*s*) See the repealed s. 168 of the C. L. P. Act, 1852.

(*t*) R. S. C., Appendix (A), Part III., Sect. 4.

property lies should be correctly stated. The prescribed form above given says "in the parish of ——, in the county of ——." If any mistake be made, an amendment will generally be permitted at the trial, unless it appear that the defendant has been actually misled or prejudiced by the misdescription (*u*).

Names of claimants. — The writ should state correctly the names of all the persons in whom the title is alleged to be: but the Rules of the Supreme Court give "the court or a judge" ample powers for adding parties at any stage of the proceedings (*x*), and for allowing one or more of many parties having the same interest to sue on behalf of all (*y*). The writ need not attempt to distinguish whether all or any of the plaintiffs claim jointly or severally.

Joinder of claim for mesne profits, &c. — The plaintiff cannot, without leave of a court or a judge, join any cause of action with an action for the recovery of land, except claims in respect of mesne profits or arrears of rent or double value in respect of the premises claimed, or any part thereof, and damages for breach of any contract under which the same or any part thereof are held, or for any wrong or injury to the premises claimed (*z*).

[*799] *The application for leave to join another cause of action must be made before the issue of the writ (*a*).

Service of writ. — The writ must be served in the same way as in other actions, except where the possession is vacant, in which case service may, "when it cannot otherwise be effected, be made by posting a copy of the writ upon the door of the dwelling-house or other conspicuous part of the property (*b*)"

When the property is within the jurisdiction of the High

(*u*) See Doe *d.* Marritt *v.* Edwards, 1 Moo. & R. 319; 6 C. & P. 208.

(*x*) R. S. C., Ord. XVI., r. 13.

(*y*) Id. r. 9. And see Blake *v.* Done, 31 L. J. Ex. 100.

(*z*) R. S. C., Ord. XVII., r. 2. For instances in which joinder of other causes of action have been allowed, see Tawell *v.* The Slate Co., L. R., 3 Ch. Div. 629; Whetstone *v.* Davis, L. R., 1 Ch. Div. 99; 45 L. J., Ch. 49; Cook *v.* Enchmarsh, L. R., 2 Ch. Div. 111; 45 L. J., Ch. 504; Allen *v.* Kennet, 24 W. R. 845; Kitching *v.* Kitching, 24 W. R. 901.

(*a*) Pilcher *v.* Hinds, L. R., 11 Ch. D. 905; 48 L. J., Ch. 587. C. A.

(*b*) R. S. C., Ord. IX., r. 9.

Court of Justice, an order may be made allowing the writ to be served on a defendant out of the jurisdiction (*c*).

Substituted service may be allowed in some cases (*d*).

Service on several defendants. — Generally speaking, each defendant should be served separately. But where several defendants are in possession as joint tenants, and that is distinctly shown by affidavit, service on any one of them of a writ in the old form has been held to be sufficient (*e*).

On executors. — Therefore, also, service on one of several executors is sufficient, provided the affidavit shows them to be joint tenants in possession as such executors (*f*).

On parish officers. — Churchwardens and overseers are not considered as joint tenants, and therefore each must be served separately (*g*).

On companies. — The writ if issued against a corporation aggregate should be served on the mayor or other head officer, or on the town clerk or secretary, or if a special act provide a special manner of service, then in the manner authorized by such special act (*h*).

Where vacant possession. — We have already seen that there is a special provision for service in the case of vacant possession; but it must not be supposed that the possession of land is "vacant" merely because nobody happens to be upon it at the time of issuing or serving the writ. That frequently happens when there is a tenant in possession. There may be a legal or constructive possession without any actual occupation, or during the tenant's absence (*i*). If he has left any of his goods or chattels on the premises, or

(*c*) R. S. C., Ord. XI., r. 1. And see Daniel *v.* Woodroffe, 7 Dowl. 191, where *personal* service out of the jurisdiction was held to be sufficient.

(*d*) R. S. C., Ord. IX., r. 2. See, too, Doe *v.* Roe, 1 D. & R. 514; Doe *d.* Harrison *v.* Roe, 10 Price, 30.

(*e*) Doe *d.* Overton *v.* Roe, 9 Dowl. 1039; Doe *d.* —— *v.* Roe, 1 D. & L. 873; Doe *d.* Bennett *v.* Roe, 7 C. B. 127.

(*f*) Doe *d.* Strickland *v.* Roe, 4 D. & L. 431; 1 Bail C. C. 210, Doe *d.* Paul *v.* Hurst, 1 Chit. R. 162.

(*g*) Doe *d.* Weeks *v.* Roe, 5 Dowl. 405.

(*h*) R. S. C., Ord. IX., r. 8. See the Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), s. 135; the Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 138; the Commissioners Clauses Act, 1847 (10 Vict. c. 16), s. 90.

(*i*) See Doe *d.* Burrows *v.* Roe, 7 Dowl. 326; Doe *d.* Johnson *v.* Roe, 12th L. J., Q. B. 97; 2 Chit Arch. 1019 (11th ed.).

any part thereof — ex. gr. beer in a cellar, or hay
[*800] *in a barn — he thereby virtually retains possession of the premises, and it would be improper to proceed in ejectment as in case of a vacant possession, especially if his place of residence be known (*k*). But if the affidavit show that the person named as defendant in the writ was recently in possession as tenant of the premises sought to be recovered, and that he has since abandoned and deserted the possession of them, and cannot be served, personally or otherwise, with a copy of the writ, and that nobody was in or upon the premises, or any part thereof, at the time when a copy of the writ was posted upon the door of the dwelling-house or other conspicuous part of the property, service in the special form will probably suffice.

Notice of ejectment to defendant's landlord. — By 15 & 16 Vict. c. 76, s. 209, "every tenant to whom any such writ in ejectment shall be delivered, or to whose knowledge it shall come, shall forthwith give notice thereof (*l*) to his landlord, or to his bailiff or receiver, under penalty of forfeiting the value of three years' improved or rack rent of the premises demised or holden in the possession of such tenant, to the person of whom he holds, to be recovered by action in any court of common law having jurisdiction for the amount." In such action the plaintiff, being considered as a "party grieved," may recover the above penalty, together with full costs of suit.

There is a corresponding enactment in the County Courts Act, 19 & 20 Vict. c. 108, s. 53 (*m*).

Of course when the claimant in the ejectment is the immediate landlord of the defendant, no such notice need be given.

Appearance by defendants named in the writ. — Any person *named* as a defendant in the writ may appear within the time appointed. His right to do so cannot be questioned upon a summary application to strike out or set aside the appearance, founded upon an affidavit stating that he is not in possession, by himself or his tenants, of any part of the

(*k*) Savage *v.* Dent, 2 Stra. 1064; 1 Chit. R. 506, n.

(*l*) See form, *post*, App. C., No. 24.

(*m*) *Post*, 819.

property claimed, as that would be to allow the plaintiff to contradict his own statement made by his having named the person in question as a defendant to the action, and would amount to trying the whole question on affidavits (*n*). But, if he defend for more than he is in possession of by himself or his tenants, an application may be made to confine his appearance and defence.

Any person named in the writ may defend not only for the land in his own possession, but also for other land claimed in the writ and in the possession of his tenants, whether the latter be named in the writ or not (*o*).

By servant of tenant. — If a mere servant, bailiff or other person having no title be named as a defendant in the writ, and served with a copy, he should not * appear; [*801] for he may be personally liable as a trespasser, and his capacity of servant, &c., will afford no defence, and he may be condemned in the costs of the action (*p*). He should hand over the copy writ to his employer, and leave him to defend or not as he may think fit. If judgment be signed against him for want of appearance no costs will be recoverable (*q*); except, perhaps, as damages in a subsequent action of trespass for mesne profits, &c. (*r*); nor will the judgment be any evidence in such subsequent action that the party served with the writ, and who suffered judgment by default, was in actual possession of the land either as a tenant or trespasser, at the time of such service or judgment (*s*).

Appearance by persons not named. — Any person not named as a defendant in the writ of summons may, by leave of the court or a judge, appear and defend on filing an affidavit showing that he is in possession of the land either by himself or his tenant (*t*). Any person appearing to defend an action for the recovery of land as landlord, in respect of property whereof he is in possession only by his tenant, must state in his appearance that he appears as landlord (*u*).

(*n*) Doe *d.* Turner *v.* Gee, 9 Dowl. 612.

(*o*) Cole Ejec. 123.

(*p*) Doe *d.* Cuff *v.* Stradling, 2 Stark. 187; Doe *d.* James *v.* Stanton, 2 B. & A. 371.

(*q*) Gray on Costs, 196.

(*r*) Cole Ejec. 339.

(*s*) Id. 124, 642.

(*t*) R. S. C., Ord. XII., r. 25.

(*u*) Id. r. 19.

Court will exercise discretion. — Nice questions of title will not be entered into on such application to appear under these rules; but nevertheless the court, or judge or master, will exercise some discretion in granting or refusing the application (*x*). Where a person claims in opposition to the title of the tenant in possession, he can in no light be considered as his landlord, and should not be allowed to be a co-defendant with the tenant (*y*). Where it is shown that the tenant obtained possession from the claimant, a third person claiming adversely will not be permitted to defend as landlord of such tenant (*z*). So where the tenant obtained possession from a person through whom the plaintiff claims, and such tenant has attorned and paid rent to the plaintiff, even subsequent to the commencement of the ejectment, a third person claiming adversely, and wishing to shift the burden of proof, will not be permitted to appear and defend as landlord of the tenant in possession (*a*). But the word "landlord" extends to all persons claiming title consistent with the possession of the occupier, whether he has actually received any rent or not (*b*). It seems that a mortgagee may defend as landlord of the mortgagor whom he has permitted to remain in possession (*c*). But a mortgagee, [*802] who has no interest in * the result of an ejectment, ought not to be put forward merely to serve the purposes of the mortgagor or his tenant in possession (*d*). In an ejectment by a lessor against a lessee for a forfeiture for breaches of covenant, an elegit creditor of the lessee who has not obtained actual possession under the writ, nor receipt of any rent, will not be permitted to appear, he not being in possession by himself or his tenant within the meaning of the act (*e*). Two persons claiming separately will not be permitted to defend as landlords of the same tenant for the same

(*x*) Butler *v.* Meredith, 11 Exch. 85, 94; Whitworth *v.* Humphries, *supra*.

(*y*) Fairclaim *d.* Fowler *v.* Shamtitle, 3 Burr. 1295.

(*z*) Doe *d.* Horton *v.* Rhys, 2 Y. & J. 88.

(*a*) Whitworth *v.* Humphries, *supra*.

(*b*) Lovelock *d.* Norris *v.* Doncaster, 4 T. R. 122; Doe *d.* Heblethwaite *v.* Roe, cited 3 T. R. 783.

(*c*) Doe *d.* Tilyard *v.* Cooper, 8 T. R. 645.

(*d*) Doe *d.* Pearson *v.* Roe, 6 Bing. 613.

(*e*) Croft *v.* Lumley, 4 E. & B. 614, 24 L. J., Q. B. 78, 80; Thompson *v.* Tomkinson, 11 Exch. 442.

land (*f*). But one person may, it would seem, defend as landlord of the whole premises, and another as assignee of a sublease of part (*g*).

A person not named as a defendant in the writ, but who is in possession by himself or his tenant, will be allowed to appear and defend without giving security for costs, notwithstanding he resides abroad (*h*).

Notice of appearance by person not named in writ. — Where a person not named as defendant in the writ of summons has obtained leave of the court or judge to appear and defend, he must enter an appearance according to the ordinary rule (*i*), "intituled in the action against the party named in the writ as defendant, and shall forthwith give notice of such appearance to the plaintiff's solicitor, or to the plaintiff if he sues in person, and shall in all subsequent proceedings be named as a party defendant in the action" (*k*).

Defences as landlord. — When a person appears as "landlord" of a particular tenant in possession, he is at liberty to set up any defence which such tenant might have set up had he appeared to the action, except the want of a notice to quit from the claimant to the tenant in possession, who has suffered judgment by default (*l*). Whatever estoppels from disputing the claimant's title would have bound the tenant in possession will bind him equally (*m*), whether by act in pais or by admissions of the tenant (*n*).

Defence for part only of land claimed. — "Any person appearing to a writ of summons for the recovery of land shall be at liberty to limit his defence to a part only of the property mentioned in the writ, describing that part with reasonable certainty in his memorandum of appearance, or in a notice intituled in the cause, and signed by him or his solici-

(*f*) Doe *d.* Lloyd *v.* Roe, 15 M. & W. 431.

(*g*) See Chester *v.* Wortley, 17 C. B. 410.

(*h*) Butler *v.* Meredith, 11 Exch. 85; 24 L. J., Ex. 239; overruling Doe *d.* Hudson *v.* Jameson, 4 M. & R. 570.

(*i*) R. S. C. Ord. XII., rr. 1—15.

(*k*) Id. r. 27.

(*l*) Doe *d.* Davis *v.* Creed, 5 Bing. 327.

(*m*) Doe *d.* Knight *v.* Lady Smythe, 4 M. & S. 347; Doe *d.* Manners *v.* Mizen, 2 Moo. & R. 56; Doe *d.* Willis *v.* Birchmore, 9 A. & E. 662.

(*n*) Doe *d.* Mee *v.* Sutherland, 4 A. & E. 784.

tor. Such notice shall be served within four days [*803] after appearance; and an appearance where * the defence is not limited as above-mentioned shall be deemed an appearance to defend for the whole " (*o*). If one of several defendants, who has a good defence as to part only, joined in defending for the whole, he will thereby render himself liable to the general costs of the suit, if the claimant recover any part (*p*). It is, therefore, most important for such a defendant to give a proper notice in due time. Any defendant who defends for part only *and fails*, is liable, with the other defendants, to all the plaintiff's costs (*q*).

Form of notice for. — A form of notice limiting a defence is given in the Appendix A. to the Rules of the Supreme Court (*r*).

Default of appearance. — " In case no appearance shall be entered within the time limited for appearance, or if an appearance be entered but the defence be limited to part only, the plaintiff shall be at liberty to enter a judgment that the person whose title is asserted in the writ shall recover possession of the land, or of the part thereof to which the defence does not apply " (*s*), and affidavit of service of writ must be filed before judgment can be so entered (*t*).

Procedure upon claim for recovery of land and also for mesne profits. — If the plaintiff has indorsed on his writ a claim for mesne profits, arrears of rent or damages for breach of contract, he may still enter judgment for possession as if that was the only subject-matter of his claim, and proceed for the rest of the claim as in ordinary cases (*u*). It was formerly the rule that, in such a case, no costs should be recovered under the judgment, but that they might be recovered in a subsequent action for mesne profits, &c. (*x*). And this would seem to be still the case, as the rule of court, unlike those relating to judgment for want of appearance in money claims,

(*o*) R. S. C., Ord. XII., r. 21.

(*p*) Doe *d.* Bishton *v.* Hughes, 5 Tyr. 957; 4 Dowl. 412; Cole Ejec. 128.

(*q*) Johnson *v.* Mills, L. R., 3 C. P. 22; 37 L. J., C. P. 57.

(*r*) R. S. C., Ord. XII., r. 29, Appendix A., Part II., Form No. 3.

(*s*) R. S. C., Ord. XIII., r. 8.

(*t*) Id. r. 2.

(*u*) R. S. C., Ord. XIII., r. 9.

(*x*) Doe *v.* Davies, 1 Esp. 358; Doe *v.* Huddart, 2 C., M. & R. 316; 4 Dowl. 437; Grace *v.* Morgan, 2 Bing. N. C. 534.

is silent as to costs. But under Order LXV. of the Rules of the Supreme Court, a judge would have power to grant costs on a special application for that purpose.

Venue. — The venue in actions of ejectment was formerly local, but local venues are now abolished, the plaintiff being at liberty to propose any place at which the court sits for trial of the action, subject to alteration by order of a judge, which order may be discharged or varied by a divisional court (*y*).

Particulars. — The statement of claim should contain such particulars as will avoid the necessity of the defendants making any special application for particulars.

Defendant in possession not to plead title. — "No defendant who is in possession by himself or his tenant need *plead his title, unless his defence depends upon an [*804] equitable estate or right, or he claims relief upon any equitable ground against any right or title asserted by the plaintiff. But except in the cases hereinbefore mentioned, it shall be sufficient to state by way of defence that he is so in possession, and it shall be taken to be implied (*z*) in such statement that he denies or does not admit the allegations of fact contained in the plaintiff's statement of claim. In other cases it is enough to state that he is in possession by himself or his tenant" (*a*).

Pleading. — Specimens of pleadings in an action for the recovery of land by a landlord from his tenant may be found in the Appendix to the Rules of the Supreme Court (*b*).

Application for relief against forfeiture. — The defendant may either in the plaintiff's action or in any action brought by himself apply to the court for relief against a forfeiture incurred otherwise than by non-payment of rent under s. 14 of the Conveyancing Act, which section has been already set out and commented on (ante, p. 329). If the forfeiture be for non-payment of rent, relief may be granted under the Common Law Procedure Act (ante, p. 331).

Counter-claim. — The defendant may set up any counter-

(*y*) R. S. C., Ord. XXXVI., r. 1.

(*z*) This implication is in affirmance of Danford *v.* McAnulty, L. R., 8 App. Cas. 456.

(*a*) R. S. C., Ord. XXI., r. 21.

(*b*) R. S. C., Appendix C., Sect. vii.; and see *post*, Appendix E., Sect. 2 (b).

claim, but the court or a judge may order the claim and counter-claim to be separately tried (*c*).

Interrogatories. — In Wallen *v.* Forrestt (*d*), a tenant holding over was not allowed, in an action of ejectment by the landlord, to interrogate him as to whether his title had expired.

Want of prosecution. — If a plaintiff who is bound to deliver a statement of claim fails to do so, the defendant may apply for judgment dismissing the action with costs for want of prosecution (*e*).

Default in pleading by defendant. — If a defendant is in default with his pleading, the plaintiff may enter a judgment, that the person whose title is asserted in the writ of summons shall recover possession of the land with his costs (*f*). If a claim for mesne profits, &c., be added in the writ, the plaintiff may have judgment for them, and an inquiry, if required, as to the amount as in other actions for pecuniary debts or damages (*g*).

Non-appearance of a party at trial. — Formerly in the event of the defendants not appearing at the trial, the plaintiff was entitled to judgment in ejectment without proof (*h*), but had to prove his claim for mesne profits, &c., as in other undefended actions. Under the present practice there is only one rule applying to all actions, viz.: "If when an action is called on for trial, the plaintiff appears and the de- [*805] fendant does not appear, then the *plaintiff may prove his claim, so far as the burden of proof lies upon him" (*i*). If "the defendant appears and the plaintiff does not appear, the defendant, if he has no counter-claim, shall be entitled to judgment dismissing the action; but if he has a counter-claim, then he may prove such claim so far as the burden of proof lies upon him" (*k*).

Number of counsel heard. — Only one counsel will be allowed to address the jury on behalf of the claimants, whether they claim under the same or distinct titles (*l*); but, of course, one may open the case, and another sum up the evi-

(*c*) R. S. C., Ord. XXI., r. 15.
(*d*) L. R., 7 Q. B. 239.
(*e*) R. S. C., Ord. XXVII., r. 1.
(*f*) Id. r. 7.
(*g*) Id. r. 8, and rr. 2—6.
(*h*) 15 & 16 Vict. c. 76, s. 183.
(*i*) R. S. C., Ord. XXXVI., r. 31.
(*k*) Id. r. 32.
(*l*) Doe *d.* Fox *v.* Bromley, 6 D. & R. 292, 294.

dence, as may be arranged between them. Only one counsel will be allowed to address the jury on behalf of the defendants except where they appear to the action and defend *separately* in respect of different parts of the property, or under distinct titles (*m*): but the counsel for each defendant who defends separately may cross-examine the plaintiff's witnesses, and may also produce and examine witnesses for his own client (*m*), and it seems that the counsel for one defendant may open the defence, and the counsel for another sum up the evidence, as may be arranged between them.

Right to begin. — The claimant is generally entitled to begin, because the onus of proof lies on him to show his title: but the defendant will be allowed to begin upon admitting the whole of the plaintiff's case (i.e. each and every link of his title), and relying upon a totally distinct title (*n*).

Evidence for plaintiff, proof of title. — Proof of a sufficient title in any one or more of the claimants will support the action, either for the whole or for part of the property, according to the evidence (*o*). But where a title is shown to less than the whole, the evidence for the claimants must show to what particular part or share they are entitled; the onus of proof on this point lies on them (*p*), and the defendant is entitled to have a verdict entered for him as to such part, or the residue, to which no such title is shown (*q*).

What kind of title may be proved. — The claimants must either prove a title by estoppel (*r*), or a legal title to actual possession of the property claimed, or some part or share thereof; and it must appear that such title was vested in them, or some or one of them (*s*), on the day mentioned in the writ (*t*), and from thence until the writ was served (*u*).

(*m*) Doe *d.* Hogg *v.* Tindall, 3 C. & P. 565; Moo. & M. 314.

(*n*) Doe *d.* Bather *v.* Brayne, 5 C. B. 655.

(*o*) See, for example, Doe *d.* Rowlanson *v.* Wainwright, 5 A. & E. 520; Elliss *v.* Elliss, E., B. & E. 81; 27 L. J., Q. B. 316; Lloyd *v.* Davis, 15 C. B. 76, 79.

(*p*) Doe *d.* Hellyer *v.* King, 6 Exch. 791; 2 Low, M. & P. 493; Doe *d.* Bowman *v.* Lewis, 13 M. & W. 241; 2 D. & L. 667.

(*q*) Alcock *v.* Wilshaw, 2 E. & E. 633; 29 L. J., Q. B. 143; Owen *v.* Owen, 3 H. & C. 89, 95; 33 L. J., Ex. 237.

(*r*) Doe *d.* Bord *v.* Burton, 16 Q. B. 807.

(*s*) *Supra* (*o*).

(*t*) Cole Ejec. 94, 288.

(*u*) Doe *d.* Gardner *v.* Kennard, 12

[*806] * The claimant's evidence must show a legal right to actual possession. The claimant must generally recover upon the strength of his own title, and not upon any weakness or defect in the defendant's title (*x*). But, as between landlord and tenant, the evidence is generally of a title by estoppel.

Commencement of title. — The claimant's title to actual possession must be shown to have accrued on or before the day on which possession is claimed in the writ. Therefore, where the defendant was tenant at will, it must appear that the will was determined on or before the day mentioned in the writ (*y*). It is, however, sufficient that the claimant's right of entry accrued on the very day on which possession is claimed in the writ, even in an action for a forfeiture (*z*). But the claimant's title must be shown to have continued down to and until the service of the writ (*a*). If the day be erroneously stated in the writ prior to that on which the claimant's title accrued, the judge at nisi prius may, if he thinks fit, allow the date to be amended, even in an action for a forfeiture (*b*). But this, of course, is in the discretion of the judge (*c*).

Evidence of the lease or agreement. — In ejectment between landlord and tenant, or their respective representatives, the claimant must always prove the lease or agreement in writing (if any), or the oral contract, under which the defendant, or the person through whom he claims, held possession.

The claimant must prove that the lessee had possession of the premises sought to be recovered, or some part thereof, under or by virtue of the lease or agreement in writing, or of the oral letting, as the case may be.

Encroachments. — Encroachments may be recovered together with and as part of the demised premises; or if all

Q. B. 244; Newby *v.* Jackson, 1 B. & C. 454.

(*x*) See Cole on Ejec. 87.

(*y*) Goodtitle *d.* Galloway *v.* Herbert, 4 T. R. 680; Doe *d.* Jacobs *v.* Phillips, 10 Q. B. 130.

(*z*) See Doe *d.* Graves *v.* Wells, 10 A. & E. 427.

(*a*) See note (*u*), *supra*.

(*b*) Doe *d.* Edwards *v.* Leach, 3 M. & G. 229; 9 Dowl. 877; Doe *d.* Simpson *v.* Hall, 5 M. & G. 795; 1 D. & L. 49.

(*c*) See Doe *d.* Loscombe *v.* Clifford, 2 C. & K. 448.

the premises originally demised have been delivered up to the landlord, they may be recovered separately (*d*): and they may be so recovered at any time within the period limited for the recovery of the demised premises, i.e. within twelve years (*e*) after the expiration of the term. But an encroachment made by the tenant before the commencement of his tenancy cannot be recovered (*f*).

Assignment of the term to the defendant. — If the defendant be not the lessee, it must be proved that he came into possession under or after the lessee. Such evidence (in the absence of proof to the contrary) will show that he entered into possession as assignee of the term (*g*). Proof that the defendant has on his own *account paid some of [*807] the rent reserved by the lease or agreement, would be strong evidence of his being such assignee.

Assignment of the reversion to the claimant. — If the claimant be not the lessor, his title to the reversion must be deduced and proved by the production of proper conveyances of the reversion. But if it be shown that the defendant has paid to the plaintiff some of the rent reserved by the lease or agreement, or that he has submitted to a distress made by the plaintiff for such rent, and so in effect admitted his title, that will be sufficient, as he will be estopped from denying the title of a person whom he has treated as his landlord (*h*).

Where a forfeiture is relied on, it must appear that the reversion was assigned to and became vested in the claimant before such forfeiture (*i*): and that the proviso for re-entry extends to the claimant as such assignee (*k*). A power of re-entry reserved to the lessor, but not mentioning his heirs, or his executors or administrators, will not extend to them (*l*). If "assigns" be mentioned, but not heirs or executors, it

(*d*) Andrews *v.* Halces, 2 E. & B. 349.

(*e*) 37 & 38 Vict. c. 57.

(*f*) Dixon *v.* Baty, L. R., 1 Ex. 259; 14 W. R. 836.

(*g*) Doe *d.* Morris *v.* Williams, 6 B. & C. 41; Doe *d.* Hindley *v.* Rickardy, 5 Esp. 4; Rees *d.* Mears *v.* Perrott, 4 C. & P. 230.

(*h*) See *ante*, 200; and Doe *d.* Marlow *v.* Wiggins, 4 Q. B. 367; Doe *d.* Prichett *v.* Mitchell, 1 Brod. & B. 11; Gravenor *v.* Woodhouse, 2 Bing. 71; Cooke *v.* Loxley, 5 T. R. 4.

(*i*) See in Hunt *v.* Bishop, 8 Exch. 675, 680; 9 Id. 635.

(*k*) Cole Eject. 404, 405.

(*l*) Hassell *d.* Hodgson *v.* Gowthwaite, Willes, 500; Doe *d.* Gregson *v.* Harrison, 2 T. R. 425.

seems that the assigns can take advantage of the condition only during the lessor's life, but not afterwards (*m*).

The right of entry. — It must appear that on or before the day mentioned in the writ of ejectment the term or tenancy expired by effluxion of time, or that it was duly determined by notice, by an act causing a forfeiture, or otherwise as the case may be (*n*). The forfeiture (if any) must have accrued on or before the day mentioned in the writ of ejectment, and whilst the claimant was the owner of the reversion.

Mesne profits. — If the claimant seek to recover mesne profits he must prove — 1. His right to recover possession of the whole or part of the premises mentioned in the writ. No mesne profits are recoverable in an ejectment, except as between landlord and tenant. It is optional with the landlord whether he will seek to recover in the ejectment any mesne profits. Such option may be exercised at the trial without any previous notice in that behalf (*o*); but the writ must have been indorsed with a claim for mesne profits (*p*). 2. The value of the mesne profits from the day of the expiration or determination of the defendant's interests in the same, down to the time of the verdict, or to some preceding day to be specially mentioned therein, must be proved as in an action for mesne profits.

It is generally advisable for a landlord to take a [*808] verdict for the * mesne profits where the defendant appears at the trial, and has previously given bail "to pay the costs *and damages* which shall be recovered by the claimants in the action," pursuant to 15 & 16 Vict. c. 76, s. 213 (*q*). But where the defendant does not appear at the trial, the claimant seldom offers proof of his title, &c., for the mere purpose of recovering mesne profits. He may, however, do so, and sometimes with advantage, especially where bail has been given as above mentioned.

Evidence for defendant. — The defendant may prove that his tenancy has not expired, or been duly determined by notice to quit or otherwise; or that a new tenancy has since been

(*m*) Co. Litt. 215 b, n. (1).
(*n*) *Ante*, Ch. VIII.
(*o*) Smith *v.* Tett, 9 Exch. 307.
(*p*) See R. S. C., App. A., Part III., Sect. iv.
(*q*) *Ante*, Sect. 2 (a).

created, either expressly or impliedly by the payment and acceptance of rent due at a later period (*r*). If a forfeiture be relied on, the defendant may not only dispute the sufficiency of the claimant's evidence on that point, and also produce contradictory evidence, but he may also (if he can) prove a waiver of such forfeiture, with full knowledge thereof (*s*). But this evidence will not avail where there has been a continuing breach after such waiver (*t*). If the ejectment be for non-payment of rent the defendant may prove payment of such rent, or of all the arrears except less than one half-year's rent; or that there was a sufficient distress on the demised premises, or some part thereof, to countervail all the arrears due, and that such distress might have been found with reasonable diligence (*u*). But such proof will not avail if a strict demand of the rent according to the rules of the common law be proved (*x*); or such formal demand be dispensed with by the terms of the proviso for re-entry contained in the lease (*y*).

When tenant can deny landlord's title. — Generally speaking, as we have seen in discussing the modes of estoppel (*z*), a tenant and any person claiming through or under him is estopped from disputing the landlord's title to demise: but he may show by evidence that it has since expired or been legally determined, or parted with by way of mortgage, sale or otherwsie (*a*). When the lessor himself does not sue, the *derivative* title of the claimant may be disputed, so far as that can be done without impugning the lessor's right to demise according to the terms of the lease; unless, indeed, the defendant has admitted the claimant's title by payment of rent or otherwise, and such admission cannot be ex-

(*r*) Doe *d.* Hollingsworth *v.* Stennett, 2 Esp. 717; Bishop *v.* Howard, 2 B. & C. 100.

(*s*) Croft *v.* Lumley, 5 E. & B. 648; 25 L. J., Q. B. 223; 6 H. L. Cas. 672.

(*t*) Doe *d.* Baker *v.* Jones, 5 Exch. 498; Doe *d.* Muston *v.* Gladwin, 6 Q. B. 953; Doe *d.* Flower *v.* Peck, 1 B. & Adol. 428; Doe *d.* Ambler *v.* Woodbridge, 9 B. & C. 376.

(*u*) As to when there is a sufficient distress on the premises, see Doe *d.* Haverson *v.* Franks, 2 C. & K. 678.

(*x*) Acocks *v.* Phillips, 5 H. & N. 183.

(*y*) Doe *d.* Harris *v.* Masters, 2 B. & C. 490; 1 D. & R. 45.

(*z*) *Ante*, 213.

(*a*) Longford *v.* Selmes, 3 Kay & J. 220.

[*809] plained away by evidence *showing fraud or mistake (*b*). Sometimes the defendant may prove a determination or suspension of the right of re-entry by an eviction from part of the demised premises (*c*).

Statute of Limitations. — If there be a term created by deed, and such term has not yet expired, the Statute of Limitations has no application. For however long a time rent may have been omitted to be paid, the landlord's right to re-enter subsists for the whole length of the term, however long. This is the effect of Grant *v.* Ellis (*d*), Doe *d.* Davey *v.* Oxenham (*e*), and the House of Lords case of Archbold *v.* Scully (*f*).

Judgment enforced by writ of possession. — A judgment for the plaintiff may be enforced by writ of possession (*g*) in the manner formerly used in actions of ejectment in the superior courts of common law (*h*), and the person prosecuting the judgment is entitled to sue out the writ of possession, without any order for the purpose, upon filing the affidavit showing due service of the judgment, and that the same has not been obeyed (*i*). There may be either one writ for possession and costs, or separate writs, at the election of the claimant (*k*).

Issue of writ of possession though landlord's own term expired. — A landlord whose own term has expired after judgment recovered may be none the less entitled to a writ of possession, the burden of proof lying upon the defendant to show that the issue of such a writ would be unjust. This was held by the Court of Appeal in Knight *v.* Clarke (*l*). In that case the plaintiff was possessed of one day's residue of a term of 98 years, and the defendant's term by underlease had expired two days before the plaintiff sued the defendant in ejectment. The action was tried and judgment recovered nine months

(*b*) See Cole Ejec. 219.

(*c*) Wheeler *v.* Stevenson, 6 H. & N. 155.

(*d*) Grant *v.* Ellis, 7 M. & W. 101.

(*e*) Doe *v.* Oxenham, 9 M. & W. 113.

(*f*) Archbold *v.* Scully, 9 H. L. C. 360.

(*g*) R. S. C., Ord. XLII., r. 5.

(*h*) R. S. C., Ord. XLVII., r. 1.

(*i*) Id. r. 2. For the mode of enforcing writs of possession, see Chit. Arch. Pr. II. 1045.

(*k*) R. S. C., Order XLVII., r. 3.

(*l*) Knight *v.* Clarke, L. R., 15 Q. B. D. 294.

after the expiration of the plaintiff's title, but Matthew, J., at the trial allowed a writ of possession to issue, and the Court of Appeal affirmed his decision, it not appearing that the freeholder objected to the possession of the plaintiff.

At what time execution may issue. — Under the former practice, the judge had power by the statute 11 Geo. 4 & 1 Will. 4, c. 70, s. 38 (which was, it may be observed, left untouched by the Common Law Procedure Acts), to grant immediate possession. This section is, however, repealed by the Statute Law Revision Act of 1873. There is no provision in the Rules of the Supreme Court as to the time at which a writ of possession may issue, except that there is a general rule, that "As between the original parties to judgment, execution may issue at any time within six years from recovery of the judgment" (*m*); which would seem to imply, *that execution by writ of possession may issue im- [*810] mediately after judgment is entered. Execution for mesne profits, &c., or costs, may always, unless it be specially ordered otherwise, issue immediately on the entry of judgment (*n*).

Staying execution. — When a landlord obtains a verdict in ejectment against a tenant who has found security for the costs and damages, pursuant to 15 & 16 Vict. c. 76, s. 213 (*o*), the judgment or execution cannot be stayed by order of the judge, except under the circumstances and in manner provided by sect. 215 (*p*).

Sect. 3. — *By Proceedings in the County Court.*

By the statutes giving jurisdiction to the County Courts there are two methods provided for the recovery of real property, which are sometimes distinguished as "recovery of possession" and "ejectment;" the limit of the former being where neither annual value nor rental exceeds 50*l.*, that of the latter where neither annual value nor rental exceeds 20*l.* The former of these is confined to the cases of wrongful holding

(*m*) R. S. C., Ord. XLII., r. 22.
(*n*) Id. r. 17.
(*o*) *Ante*, Sect. 2 (a).
(*p*) *Ante*, Sect. 2 (a).

over, and leaving rent unpaid. For these cases a special procedure is provided, analogous to that of the Common Law Procedure Act, 1852, sects. 213 and 210. The latter method, so far as the statute goes, is of general application; but a County Court rule confines it to the cases to which the former method is not applicable (*q*).

The special procedure was introduced in 1856, but it was not until 1867 that the general jurisdiction in "ejectment," as it was then termed, was given to County Courts.

(a) *Actions by Landlords for Recovery of Small Tenements after Term expired, or determined by Notice to quit.*

By the County Courts Act, 1856 (19 & 20 Vict. c. 108), s. 50, "when the term and interest of the tenant of any corporeal hereditament *where neither the value of the premises nor the rent* payable in respect thereof shall have *exceeded* 50*l. by the year*, and upon which *no fine or premium* shall have been paid, *shall have expired, or shall have been determined* either by the landlord or the tenant *by a legal notice to quit*, and such tenant, or any person holding or claiming by, through, or under him, *shall neglect or refuse to deliver up possession ac-*
[*811] *cordingly*, * the landlord may enter a plaint, at his option either against such tenant or against such person so neglecting or refusing, *in the County Court of the district in which the premises lie* for the recovery of the same, and thereupon a summons shall issue to such tenant or such person so neglecting or refusing; and if the defendant shall not, at the time named in the summons, show good cause to the contrary, then, *on proof of his still neglecting or refusing* to deliver up possession of the premises, *and of the yearly value and rent* of the premises, *and of the holding, and of the expiration or other determination of the tenancy with the time and manner thereof, and of the title of the plaintiff*, if such title has accrued since the letting of the premises, *and of the service of the summons* if the defendant shall not appear thereto, the judge may order that possession of the premises mentioned in the plaint be given by the defendant to the plaintiff,

(*q*) C. C. Rules, 1875, Ord. XXXVIII., r. 25.

either forthwith or on or before such day as the judge shall think fit to name; and if such order be not obeyed, the registrar, whether such order can be proved to have been served or not, shall, at the instance of the plaintiff, issue a warrant authorizing and requiring the high bailiff of the court to give possession of such premises to the plaintiff."

Restriction on value. — Under this section neither the rent paid between the litigant parties (*r*) nor the annual value of the premises to let to a tenant from year to year at a fair rack-rent (without deducting any ground rent paid to a superior landlord) may exceed 50*l.* per annum (*s*). If any fine or premium was paid the remedy is by ejectment in the High Court; unless, indeed, neither the annual value nor the rent exceed 20*l.* (*t*).

Conclusiveness of proceedings. — A warrant obtained by a landlord proceeding against a lessee not in possession is not conclusive against the person actually in possession.

Claim for rent or mesne profits. — By sect. 51, "in any plaint *against a tenant* (*u*), as in the last preceding section is specified, the plaintiff may add a claim *for rent or mesne profits, or both*, down to the day appointed for the hearing, or to any preceding day named in the plaint, *so as the same shall not exceed* 50*l.*, and any misdescription in the nature of such claim may be amended at the trial" (*x*).

C. C. rules and forms (1875). — The time and mode of proceeding under the above act are now regulated by certain rules of practice and forms which came into operation in 1875. The previous rules then ceased to be used (*y*).

* **Plaint.** — The action must be commenced by a [*812] plaint (*z*) entered in the County Court of the district wherein the tenements are situate; and thereupon a

(*r*) Brown *v.* Cocking, L. R., 3 Q. B. 672; 37 L. J., Q. B. 250.

(*s*) Elston *v.* Rose, L. R., 4 Q. B. 4; *Re* Helstone, 38 L. J., Q. B. 6.

(*t*) *Post*, Sect. 3 (c).

(*u*) Not against any other person so neglecting or refusing, &c.

(*x*) It has been held that this section cannot be made use of when the action is against a subtenant; Campbell *v.* Loader, 3 H. & C. 520; 34 L. J., Ex. 50.

(*y*) Pollock and Nicol on County Courts (8th ed.). See Forms, *post*, Appendix E.

(*z*) This is prepared by the Registrar and entered in the book kept for that purpose in his office.

summons (*a*) shall issue. This must be served pursuant to section 54 (*b*). The decision of the judge as to the sufficiency of the service is conclusive (*c*).

No jury. — Neither party can require a jury to be summoned as in other actions, but the judge decides all questions of law and fact (*d*).

Proof of tenancy. — To maintain the action under the above section it is necessary that the plaintiff should prove:

That the ordinary relation of landlord and tenant of the property claimed has existed between the plaintiff and defendant; or between the plaintiff and some other person by, through, or under whom the defendant holds or claims (*e*). It is not necessary to show that the plaintiff was the original lessor; it is sufficient to prove that when the term expired, or was determined, he was the immediate reversioner of the tenements; or if such reversion then belonged to several persons, as joint tenants, coparceners or tenants in common, that the plaintiff was one of the persons so entitled (*f*). But if the title of the plaintiff accrued since the letting of the premises, such title must be deduced from the landlord and proved in the usual manner. Thus under the 9 & 10 Vict. c. 95, where the plaintiff claimed as a mortgagee, and the defendant under a demise from the mortgagor *subsequent* to the mortgage, and the defendant had never attorned to the plaintiff or consented to hold under him: it was held, that the statute did not apply and consequently that the County Court had no jurisdiction (*g*). Again, where the defendant had been let into possession under an agreement to purchase, one of the terms of which was that he should pay 8*s*. a week rent, to be afterwards deducted from the purchase-money, and it appeared that he had paid sums which, together with the set-off, equalled the amount of the purchase-money: it was held, that the ordinary relation of landlord and tenant

(*a*) See Form, *post*, Appendix E., Sect. 3 (c).

(*b*) *Post*, subs. (c).

(*c*) Robinson *v.* Lenaghan, 2 Exch. 333.

(*d*) Pollock & Nicol C. C. Prac. 270 (8th ed.); but it is otherwise with respect to actions of ejectment under 30 & 31 Vict. c. 142, s. 11; C. C. Rule, Ord. XVI., r. 3.

(*e*) Jones *v.* Owen, 5 D. & L. 669; Banks *v.* Rebbeck, 2 L., M. & P. 542.

(*f*) 9 & 10 Vict. c. 95, s. 142.

(*g*) Jones *v.* Owen, 5 D. & L. 669.

did not exist between the parties, and therefore that the County Court had no jurisdiction (*h*).

Proof of tenancy of defendant. — The defendant must be proved to have been either the tenant to whom the demise was made, or a person "holding or claiming by, through, or under him" (*i*). Any person who obtains the possession from the tenant by the tenant's voluntary act directly or indirectly, *either as an assignee or a subtenant, [*813] or by fraud and collusion with the tenant, is within the statute, and estopped from denying the landlord's title (*k*). Proof that the defendant came into possession after the original tenant entered and during the continuance of the demise, is primâ facie evidence that he obtained possession as assignee of the term (*l*), or in some way claims by, through, or under the tenant within the meaning of the statute.

No real dispute as to the title. — There must be no real dispute or question between the parties as to the right and title of the plaintiff, or of the defendant, to the tenements: otherwise the County Court will have no jurisdiction under this act (*m*), unless by the written consent of both parties, signed by them or their solicitors (*n*). Generally speaking, as we have seen, a tenant cannot dispute a landlord's title (*o*). And where and so far as that rule is applicable, no such dispute or question can legally arise between the parties (*p*). In some cases, however, a tenant may prove that since the demise his landlord's title has ceased, or been duly determined, or assigned over to some third person, who has made a fresh demise or conveyance to the defendant: or, if the plaintiff be not the original lessor, or the person from whom

(*h*) Banks *v.* Rebbeck, 2 L., M. & P. 452.

(*i*) *Ante*, 810.

(*k*) *In re* Emery *v.* Barnett, 4 C. B., N. S. 423; 27 L. J., C. P. 216.

(*l*) See Cole Ejec. 224.

(*m*) Pearson *v.* Glazebrook, L. R., 3 Ex. 27; 37 L. J., Ex. 15. In this case the defendant claimed the freehold, subject only to the payment of a quit rent.

(*n*) 19 & 20 Vict. c. 108, s. 25; see the form of such consent, No. 78 in the Schedule to the C. C. Rules, 1875.

(*o*) *Ante*, 214.

(*p*) *Re* Emery *v.* Barnett, 4 C. B., N. S. 423; 27 L. J., C. P. 216; Lloyd *v.* Jones, 6 C. B. 81; Barbour *v.* Barlow, 8th July, 1856, *per* Bramwell, B., at Chambers.

the defendant obtained possession of the demised premises, the latter may prove that he paid rent to the plaintiff, or submitted to a distress made by him for rent, by mistake and in ignorance of the real facts; and that the plaintiff really has no title. In such cases, upon proof of facts of the above nature, the County Court would have no jurisdiction to proceed further (*q*).

Duty of the judge. — But it is the duty of the judge to inquire into the facts and to hear the evidence, so far as is necessary to ascertain that a real question as to the title legally may and actually does exist between the parties; and that it is not a mere pretence raised by the defendant for the sole purpose of ousting the jurisdiction of the County Court. If it appear to him that a bonâ fide question as to title does exist, he should decline to proceed further, or strike out the cause for want of jurisdiction (*r*), in which case he may (if he thinks fit) award costs against the plaintiff (*s*). If it appear that no such question can legally be raised by the defendant, or that no such question does actually exist, and that the objection is a mere pretence of the defend-
[*814] ant for *the purpose above mentioned, the judge should overrule the objection and proceed to hear and determine the action (*t*). If he decide erroneously upon the question whether certain facts do raise a question of title, the defendant may appeal to the High Court of Justice (*u*); or a rule or order (in lieu of a mandamus) may be applied for to the court (*x*), or to a judge pursuant to 19 & 20 Vict. c. 108, s. 43 (*y*); or a prohibition may be applied for (*z*). Formerly, if the court or a judge directed the ap-

(*q*) 9 & 10 Vict. c. 95, s. 58; Marwood *v.* Waters, 13 C. B. 820.

(*r*) Pearson *v.* Glazebrook, L. R., 3 Ex. 27; 37 L. J., Ex. 15; Sewell *v.* Jones, 1 L., M. & P. 525.

(*s*) 30 & 31 Vict. c. 142, s. 14.

(*t*) Fearon *v.* Norvall, 5 D. & L. 439; Lilley *v.* Harvey, Id. 648; Owen *v.* Pearce, Id. 654, n.; *Re* Emery *v.* Barnett, *supra*; Lothem *v.* Spedding, 17 Q. B. 440; Lloyd *v.* Jones, *supra*.

(*u*) Mountnoy *v.* Collier, 1 E. & B. 630.

(*x*) Pearson *v.* Glazebrook, *supra*.

(*y*) *In re* Emery *v.* Barnett, *supra*.

(*z*) 13 & 14 Vict. c. 61, s. 22; 19 & 20 Vict. c. 108, ss. 40, 41, 42; Jones *v.* Owen, 5 D. & L. 669; Banks *v.* Rebbeck, 2 L., M. & P. 452; Marwood *v.* Waters, 13 C. B. 820; *Re* Chew *v.* Holroyd, 8 Exch. 249; Lawford *v.* Partridge, 1 H. & N. 621; 26 L. J., Ex. 147.

plicant to declare in prohibition pursuant to 1 Will. 4, c. 21, the question of jurisdiction became one of pleading and evidence (*a*). But now "when an application shall be made to a superior court, or a judge thereof, for a writ of prohibition to be addressed to a judge of a County Court, the matter shall be finally disposed of by rule or order, and no declaration or further proceedings in prohibition shall be allowed" (*b*): and no renewed application can be made, except to the same court or judge under special circumstances (*c*).

Neither annual value nor rent must exceed 50*l*. — The plaintiff must prove that "neither the value of the premises, nor the rent payable in respect thereof," has exceeded 50*l*. by the year (*d*). Under the 9 & 10 Vict. c. 95, s. 122, if the rent reserved were under 50*l*. per annum, and no fine paid, the court had jurisdiction, notwithstanding the annual value of the premises had increased, by buildings or otherwise, to a much greater amount than 50*l*. (*e*). Now neither the rent nor the annual value may exceed 50*l*., and this must be proved at the trial, whether the defendant appear there or not.

There must have been no fine or premium. — He must show that "no fine or premium" was paid for the lease. This will sufficiently appear by the lease, in the absence of express proof to the contrary.

The term must have expired or been determined by notice to quit. — He must show that the term or tenancy has *expired or been determined* either by the landlord or the tenant by a legal notice to quit. The statute expressly requires proof at the trial of the holding, and of the expiration or other determination of the tenancy, with the time and manner thereof, whether the defendant appear at the trial or not. We have already fully considered the law as to notices to quit (*f*). When the landlord seeks to recover the premises by reason

(*a*) Thompson *v.* Ingham, 14 Q. B. 716; 2 L., M. & P. 216.
(*b*) 19 & 20 Vict. c. 108, s. 42.
(*c*) Id. s. 44.
(*d*) *Ante*, 810.
(*e*) *In re* Earl of Harrington *v.* Ramsey, 8 Exch. 879; 2 E. & B. 669; Fearon *v.* Norvall (2), 5 D. & L. 445; but see Crowley *v.* Vitty, 7 Exch. 319.
(*f*) *Ante*, 332.

[*815] of a * forfeiture committed by the tenant, and a condition or proviso for re-entry, the action is not maintainable under this section (*g*).

Defendant must neglect or refuse to deliver up possession. — He must show that the defendant has neglected or refused, and still neglects or refuses, to deliver up possession of the premises. For the purpose of showing this, a demand of possession should be made, and, if possible, a refusal obtained in like manner as under the 15 & 16 Vict. c. 76, s. 213 (*h*). The act requires "proof of his still neglecting or refusing to deliver up possession of the premises." But proof that he retains possession of them after demand made, as above mentioned, will be primâ facie evidence that he still refuses, or at all events neglects to deliver up possession (*i*).

Service of summons. — If the defendant do not appear at the trial, the service of the summons must be proved (*k*). The judge's decision as to the sufficiency of the service is conclusive (*l*).

Mesne profits. — If the plaintiff seek to recover rent or mesne profits pursuant to sect. 51 (*m*), he must prove *the amount* in like manner as in an action of ejectment. But the other evidence as to the tenancy, &c., will generally be sufficient to prove the amount or value of the mesne profits.

Defendant may prove that there is no tenancy. — When the landlord proceeds under this section, the defendant may produce contradictory evidence, so far as he is not estopped from so doing by the relation of landlord and tenant. Thus, he may show that the ordinary relation of landlord and tenant never existed as between him and the plaintiff, or as between any persons under whom they respectively claim (*n*). But, generally speaking, if the defendant's tenancy to the plaintiff be sufficiently proved, or if it appear that the defendant obtained possession through or under the plaintiff or his tenant, the defendant will not be permitted to dispute

(*g*) Doe *d.* Cundy *v.* Sharpley, 15 M. & W. 558.

(*h*) *Ante*, Sect. 2 (a).

(*i*) See Cole Ejec. 656.

(*k*) As to the mode of service, *vide* sect. 54.

(*l*) Robinson *v.* Lenagham, 2 Exch. 333.

(*m*) *Ante*, 811.

(*n*) Jones *v.* Owen, 5 D. & L. 669; Banks *v.* Rebbeck, 2 L., M. & P. 452.

the plaintiff's title; and where that is the case, no dispute or question as to the title can arise, so as to exclude the jurisdiction of the County Court (*o*).

Plaintiff's title ceased. — Sometimes, however, he may show that since the demise the plaintiff's title has expired or ceased, or been determined, or assigned to some person from whom the defendant has obtained a fresh demise or conveyance (*p*); or that the defendant has a title to the premises not inconsistent with his tenancy to the plaintiff during the term. When anything of this sort is proved, and a *bonâ fide* question as to the title sufficiently appears, the judge should, as we have seen, abstain from deciding in favour of either party, for want of jurisdiction (*q*). It was once held to be no defence that an action of ejectment was
*pending in one of the superior courts for the same [*816] property upon the same title (*r*).

Verdict and judgment for plaintiff. — If a verdict and judgment be found for the plaintiff, the judge will order that possession of the premises mentioned be given by the defendant to the plaintiff, either forthwith or on or before such a day as the judge shall think fit to name (*s*).

Proceedings not conclusive. — An order of a County Court judge under sect. 50 is not analogous to a judgment in ejectment, so as to entitle the landlord to maintain a subsequent action of trespass for mesne profits, &c. It creates no estoppel (*t*). Nor, where the order is obtained by the landlord proceeding against his tenant, but not against a person in possession of a sublease is the order conclusive against the sublessee, who, may, notwithstanding the order, sue the landlord in trespass, if the landlord had not in fact a right to possession (*u*).

(*o*) Barbour *v.* Barlow, Cole Ejec. 655, n. (*a*).

(*p*) See Cole Ejec. 217, 657.

(*q*) 9 & 10 Vict. c. 95, s. 58.

(*r*) Bissill *v.* Williamson, 7 H. & N. 391; 31 L. J., Ex. 131.

(*s*) See Form, *post*, Appendix E., Sect. 3 (c).

(*t*) Campbell *v.* Loader, 3 H. & C. 520; 34 L. J., Ex. 50.

(*u*) Hodson *v.* Walker, L. R., 7 Ex. 55; 41 L. J., Ex. 51; 25 L. T. 537; 20 W. R. 489, diss. Martin, B. See, however, Flitters *v.* Allfrey, L. R., 10 C. P. 29, where a landlord having evicted his tenant under a warrant as for a weekly tenancy, and having sued in a County Court for arrears of a weekly rent, was held concluded, in an action of trespass

Costs of witnesses, &c. — The costs are in the discretion of the Court. Even where the court decides that it has no jurisdiction, it *may* award costs against the plaintiff (*x*), who ought to have proceeded in the proper court.

Appeal. — If the yearly rent or value of the premises exceeds 20*l.*, the unsuccessful party may appeal pursuant to sect. 68 of the same act — the County Court Act, 1856 — either under the former practice by case stated, or by motion under the County Courts Act of 1875 (*y*).

Warrant for possession. — If the order for the delivery of possession made at the hearing be not obeyed, the registrar, whether such order can be proved to have been served or not, shall at the instance of the plaintiff issue a warrant, authorizing and requiring the bailiff of the court to give possession of such premises to the plaintiff (*z*). The effect and operation of such warrant, and the protection thereby afforded to the bailiff, &c., is hereafter stated (*a*). The plaintiff is protected from any action of *trespass*, notwithstanding any informality or irregularity in the proceedings (*b*).

(b) *Actions by Landlords for Recovery of Small Tenements for Nonpayment of Rent.*

By the County Courts Act, 1856 (19 & 20 Vict. c. 108), s. 52, "when the rent of any corporeal hereditament, *where* [*817] *neither the value of the *premises nor the rent* payable in respect thereof exceeds 50*l.* by the year (*c*), *shall for one half-year be in arrear*, and the landlord shall have *right by law to re-enter* for the nonpayment thereof, he may, *without any formal demand or re-entry*, enter a plaint *in the County Court of the district in which the premises lie* for the recovery of the premises; and thereupon a summons shall issue to the tenant, *the service whereof shall stand in lieu of a demand or re-entry*, and

for the eviction, by the decision of the County Court judge, that the tenancy was not weekly, but yearly.

(*x*) 30 & 31 Vict. 142, s. 14.

(*y*) *Post*, Sect. 3 (c).

(*z*) *Ante*, 811; see Form, *post*, Appendix E., Sect. 3 (c), No. 4.

(*a*) *Post*, Subs. (c).

(*b*) *Post*, Subs. (c).

(*c*) *Ante*, 811. It is to be observed that this section does not say "and upon which no fine or premium shall have been paid," as in sect. 50, *ante*, 810.

if the tenant shall 5 clear days before the return day of such summons, pay into court all the rent in arrear and costs, the said action shall cease; but if he shall not make such payment, and shall not at the time named in the summons show good cause why the premises should not be recovered, *then, on proof of the yearly value and rent* of the premises, *and of the fact that one half-year's rent was in arrear* before the plaint was entered, *and that no sufficient distress was then to be found* on the premises to countervail such arrear, *and of the landlord's power to re-enter, and of the rent being still in arrear, and of the title of the plaintiff*, if such title has accrued since the letting of the premises, *and of the service of the summons*, if the defendant shall not appear thereto, the judge may order that possession of the premises mentioned in the plaint be given by the defendant to the plaintiff on or before such day, not being less than 4 weeks from the day of hearing, as the judge shall think fit to name, unless within that period all the rent in arrear and costs be paid into court; and if such order be not obeyed, and such rent and costs be not so paid, the registrar shall, whether such order can be proved to have been served or not, at the instance of the plaintiff, issue a warrant authorizing and requiring the high bailiff of the court to give possession of such premises to the plaintiff, and the plaintiff *shall from the time of the execution of such warrant hold the premises discharged of the tenancy*, and the defendant and all persons claiming by, through or under him shall, so long as the order of the court remains unreversed, be barred from all relief in equity or otherwise."

Before this enactment the County Court had no jurisdiction where possession was claimed by reason of a forfeiture and a right to re-enter during the term for nonpayment of rent, but only where the term had ended, or been determined by a regular notice to quit.

This section is very similar in substance and effect to the 15 & 16 Vict. c. 76, s. 210 (*d*), save that it is restricted and confined to small cases, i.e. where neither the annual value nor the rent exceeds 50*l*. Any fine or premium paid for

(*d*) *Ante*, 787.

[*818] the lease will not deprive the County *Court of jurisdiction under this section, as it would under section 50 (*e*).

Procedure. — The mode of proceeding under this section is similar (mutatis mutandis) to that under section 50 (*f*).

Preliminary Points. — Before entering his plaint the plaintiff should clearly ascertain that he has "*a right by law to re-enter* for the nonpayment" of one half-year's rent in arrear. He can have no such right except by virtue of some condition or proviso for re-entry contained in the lease or agreement (whether by deed, writing or oral agreement, express or implied) under which the defendant holds (*g*); nor until the time or period (if any) thereby allowed to save the forfeiture has elapsed (*h*); and he should further ascertain that there is no sufficient distress *to be found* on the premises to countervail *such arrear* (*i*). The distress need not be sufficient to countervail "all the arrears," if more than one half-year's rent be due; but it is otherwise under 15 & 16 Vict. c. 76, s. 210, which is differently worded in this respect.

Half-a-year's rent in arrear. — The plaintiff will be put to exactly the same proof as in an action under sect. 50 (*j*), except that, in place of proving that the tenancy was determined by notice or expired, and that the tenant has refused to give up possession, he must give evidence of the fact that one half-year's rent was in arrear before the plaint was entered; and that before and at the time that the plaint was entered, the landlord *had power to re-enter for nonpayment of the said half-year's rent.* This will appear by the lease or agreement under which the defendant holds, or by the parol evidence of the tenancy, including the express condition or proviso for re-entry on nonpayment of rent. It must appear that the number of days (if any) allowed by such condition or proviso for payment of the rent to save the forfeiture elapsed before the plaint was entered (*k*).

(*e*) *Ante*, 810.
(*f*) *Ante*, 810.
(*g*) Cole Ejec. 403, 416, 660.
(*h*) Doe *d.* Dixon *v.* Roe, 7 C. B. 134.
(*i*) As to the mode of proving this, see Cole Ejec. 216.
(*j*) *Ante*, 810.
(*k*) Doe *d.* Dixon *v.* Roe, 7 C. B. 134.

And the same observations will apply to the case of the defendant as under sect. 50, subject to the same exception as herein mentioned with regard to the ground on which the possession is claimed by the landlord. The defendant may, however, put an end to all proceedings by paying into court the arrears of rent and costs, even after hearing, if it be done within the time given to him for the purpose by order made at such hearing (*l*).

Order for delivery of possession. — If the verdict be for the plaintiff, the judge, as under sect. 50, may order that possession of the premises mentioned in the plaint be *given by the defendant to the plaintiff* on or before such day, not being less * than four weeks from the day of [*819] hearing, as the judge shall think fit to name, unless within that period all the rent in arrear and the costs be paid into court (*m*).

Warrant for possession. — The procedure in case of the order for possession being disobeyed will be the same as in cases under sect. 50 (*n*). The effect and operation of such warrant, and the protection thereby afforded to the baliff, &c., are hereafter stated (*o*). The plaintiff is protected from any action of trespass, notwithstanding any irregularity or informality in the proceedings. Moreover "the plaintiff shall from the time of the execution of such warrant hold the premises *discharged of the tenancy*, and the defendant and all persons claiming by, through or under him shall, so long as the order of the court remains unreversed, be barred from all relief in equity or otherwise" (*p*).

There are certain provisions in the County Courts Acts which, as they apply equally to both the above forms of action for recovery of possession by landlords from their tenants, may be best noticed at one time in this place. They relate to the following matters: —

(*l*) *Ante*, 817.
(*m*) *Ante*, 810.
(*n*) *Ante*, 810.
(*o*) *Post*, 820.
(*p*) *Ante*, 817.

(i.) *Service of Summons.*

How summons served. — By 19 & 20 Vict. c. 108, s. 54, "a summons for the recovery of a tenement may be served like other summonses to appear to plaints in County Courts; and if the defendant cannot be found, and his place of dwelling shall either not be known, or admission thereto cannot be obtained for serving any such summons, a copy of the summons shall be posted on some conspicuous part of the premises sought to be recovered, and such posting shall be deemed good service on the defendant."

(ii.) *Notice by Subtenant to his immediate Lessor of Summons for Recovery of Possession.*

By 19 & 20 Vict. c. 108, s. 53, "where any summons for the recovery of a tenement as is hereinbefore specified shall be served on or come to the knowledge of any subtenant of the plaintiff's immediate tenant, such subtenant being an occupier of the whole or of a part of the premises sought to be recovered, he shall *forthwith give notice thereof to his immediate landlord, under penalty of forfeiting three years' rack-rent* of the premises held by such subtenant to such landlord, to be recovered by such landlord by action *in the court from which summons shall have issued;* and such landlord on receipt of such notice, if not originally a defendant, [*820] may be added or * substituted as a defendant to defend possession of the premises in question."

This section is similar in substance and effect to s. 209 of the Common Law Procedure Act, 1852.

(iii.) *Warrant of Possession.*

Warrant for possession — how executed. — By 19 & 20 Vict. c. 108, s. 55, "any warrant to a high bailiff to give possession of a tenement shall justify the bailiff named therein in entering upon the premises named therein, with such assistants as he shall deem necessary, and in giving possession accordingly, but no entry upon any such warrant shall be made except between the hours of nine in the morning and four in the afternoon."

Date and duration of warrant. — By sect. 56, "every such warrant shall, on whatever day it may be issued, bear date on the next day after the last day named by the judge in his order for the delivery of possession of the premises in question, and shall continue in force for three months from such date but no longer, but no order for delivery of possession need be drawn up or served."

(iv.) *Amendments.*

Amendments. — By 19 & 20 Vict. c. 108, s. 57, "the judge of a County Court may at all times amend all defects and errors in any proceeding in such court, whether there is anything in writing to amend by or not, or whether the defect or error be that of the party applying to amend or not; and all such amendments may be made with or without costs, and upon such terms as to the judge may seem fit; and all such amendments as may be necessary for the purpose of determining in the existing suit the real question of controversy between the parties shall be so made, if duly applied for." But after final judgment has been given and no new trial moved for, and the unsuccessful party has given due notice of appeal, the judge has no right to correct his judgment on any point (*q*); nor is it competent for him, when once he has heard and disposed of an application for a new trial, to refuse the case at a subsequent court. He may be restrained from so doing by prohibition (*r*).

(v.) *Consequences of Irregularities and Informalities.*

Protection to officers, &c. — By 19 & 20 Vict. c. 108, s. 60, "no officer of a County Court in executing any warrant of a County Court and *no person at whose* * *instance* any such warrant shall be executed, shall be [*821] deemed a trespasser by reason of any irregularity or informality in any proceeding on the validity of which such warrant depends, or in the form of such warrant, or in the

(*q*) Irving *v.* Askew, L. R., 5 Q. B. 208.

(*r*) Great Northern Rail. Co. *v.* Mossop, 17 C. B. 130; 25 L. J., C. P. 22.

mode of executing it, but the party aggrieved may bring an action for any special damage which he may sustain by reason of such irregularity or informality against the party guilty thereof, and in such action he shall recover no costs, unless the damages awarded shall exceed *forty shillings*" (*s*).

The 9 & 10 Vict. c. 95, ss. 124, 125, containing provisions of a similar nature, are not repealed by 19 & 20 Vict. c. 108, s. 2.

(vi.) *Appeal.*

Appeal where yearly rent or value exceeds 20*l.* — By 19 & 20 Vict. c. 108, s. 68, "an appeal from the decision of a County Court *on the same grounds and subject to the same conditions* as are provided by the fourteenth section of the act of the thirteenth and fourteenth years of the reign of her present Majesty, chapter sixty-one, shall be allowed in all actions of replevin where the amount of rent or damage exceeds 20*l.*, *and in all actions for the recovery of tenements where the yearly rent or value of the premises exceeds* 20*l.*, and in proceedings in interpleader where the money claimed, or the value of the goods or chattels claimed, or of the proceeds thereof, exceeds 20*l.*, and in all actions and proceedings where the sum claimed exceeds 20*l.*"

Appeal in other cases. — The 14th section of the 13 & 14 Vict. c. 61 (referred to in the above enactment) is as follows: — "And be it enacted, that if either party in any cause of the amount to which jurisdiction is given to the County Courts by this act shall be dissatisfied with the determination or direction of the said court *in point of law or upon the admission or rejection of any evidence*, such party may appeal from the same to any of the superior courts of common law at Westminster: provided that such party shall, *within ten days* after such determination or direction, *give notice* of such appeal to the other party, or his attorney, and *also give security*, to be approved by the clerk of the court (*t*), for the costs of the appeal, whatever may be the event of the appeal, and

(*s*) Now "exceeding 10*l.*" if the action be brought in a superior court; 30 & 31 Vict. c. 142, s. 5.

(*t*) Now called the registrar; 19 & 20 Vict. c. 108, s. 8.

for the amount of the judgment if he be the defendant, and the appeal be dismissed (*u*): provided, nevertheless, that such security, so far as regards the amount of the judgment, shall not be required in any case where the judge of the County Court shall have * ordered the party appeal- [*822] ing to pay the amount of such judgment into the hands of the clerk of the County Court (*v*) in which such action shall have been tried, and the same shall have been paid accordingly; and the said Court of Appeal may either order a new trial on such terms as it thinks fit, or may order judgment to be entered for either party, as the case may be, and may make order with respect to the costs of the said appeal, as such court may think proper; and such orders shall be final."

Appeal in the form of a special case. — By 13 & 14 Vict. c. 61, s. 15, "such appeal shall be in the form of a case agreed on by both parties, or their attornies, and if they cannot agree, the judge of the County Court, upon being applied to by them or their attornies, shall settle the case and sign it, and such case shall be transmitted by the appellant to the rule department of the master's office of the court in which the appeal is to be brought."

Appeal by motion. — By the County Courts Act, 1875 (38 and 39 Vict. c. 50), s. 6, the appeal may be by motion and rule nisi, which, when no court is sitting to hear such appeals, may be obtained at chambers.

This section applies to appeals under 19 & 20 Vict. c. 108, s. 69 (*x*).

Where no appeal by consent. — By 19 & 20 Vict. c. 108, s. 69, "no appeal shall lie from the decision of the County Court, if before such decision is pronounced both parties shall agree, in writing signed by themselves or their attornies or agents, that the decision of the judge shall be final: and no such agreement shall require a stamp."

(*u*) As to how far the giving of such security is a condition precedent, without compliance with which the court cannot entertain the appeal, see Francis *v.* Dowdeswell, L. R., 9 C. P. 423, and the cases there cited.

(*v*) Now called the registrar; 19 & 20 Vict. c. 108, s. 8.

(*x*) As to the practice on such appeals, see C. C. Rules, Nos. 186—197.

(vii.) *Equitable Defences and Counter-claims and other Matters.*

With regard to equitable defences and counter-claims, as well as to the peculiarities in the County Court Rules relating to actions for the recovery of land, these matters will be found fully considered under the next head — that of "Ordinary Action in County Courts" (*y*).

(viii.) *Fees.*

By the Treasury Order of 26th October, 1875, made in pursuance of the County Court Acts of 1856, 1865, 1867 and 1875, &c., the following fees (amongst others) may be taken in the County Courts:

For every plaint — one shilling in the pound.

Where the claim or demand exceeds forty shillings, and the summons is to be served by bailiff, an additional fee of one shilling.

Where in any case the number of defendants shall exceed three, an additional fee of one shilling for each defendant above three.

[*823] * For every hearing — two shillings in the pound. An additional hearing fee shall be taken for every new trial.

For issuing every warrant to deliver possession of tenements — eighteenpence in the pound.

In plaints for the *recovery of tenements* when the term has expired or been determined by notice, all poundage except as aforesaid (i.e. except where otherwise specified in this schedule) shall be estimated on the amount of the weekly, monthly, or yearly rent of the tenement, as such tenement shall have been let by the week or month, or for any longer period; and if no rent shall have been reserved, then on the amount of the half-yearly value of the tenement, to be fixed by the registrar.

(*y*) *Post*, 823.

Where a claim for rent or mesne profits, or both is added to a plaint for the *recovery of a tenement*, an additional poundage shall be taken on the amount or amounts so claimed, but where thereby the total amount on which poundage would be taken shall exceed twenty pounds, the poundage shall be estimated on twenty pounds only.

In plaints for the *recovery of tenements* for non-payment of rent, all poundage, except as aforesaid, shall be estimated on the amount of the half-yearly rent of the tenement.

Where a counter or other claim is made under Order X. of the County Court Rules, 1875, the same fees shall be taken as upon the entry and hearing of a plaint.

In the above cases, where the poundage would, but for this direction, be estimated on an amount exceeding twenty pounds, it shall be estimated at twenty pounds only.

In every case where the poundage cannot be estimated by any rule in this schedule, it shall be estimated on twenty pounds.

All fractions of a pound, for the purpose of calculating poundage, shall be treated as an entire pound.

No increase of fees shall be made by reason of there being more than one plaintiff or defendant, except as before directed, where the number of defendants exceeds three.

(c) *Ordinary Action in County Courts.*

Ejectment where neither annual value nor rent exceeds 20*l.* — By sect. 11 of the County Courts Act, 1867 (*z*), "All actions of ejectment, where neither the value of the lands, tenements, or hereditaments, nor the rent payable in respect thereof, shall exceed the * sum of 20*l.* by the year (*a*), [*824] may be brought and prosecuted in the County Court

(*z*) 30 & 31 Vict. c. 142.

(*a*) Whether any fine or premium shall have been paid or not; but any such fine or premium may tend to show that the annual value for the time being exceeds 20*l.*

of the district in which the lands, tenements, or hereditaments are situate" (*b*).

Notice, under Conveyancing Act, before proceeding for forfeiture. — If the action be for a forfeiture caused otherwise than by non-payment of rent, it must be preceded by the notice under sect. 14 of the Conveyancing Act already set out (ante, p. 797), but the County Court has no power to grant relief against forfeiture under that act, and if the parties do not come to terms the tenant will not be able to obtain relief in the landlord's action in the County Court, but must bring an independent action of his own in the High Court.

Appeal in ejectment, &c. — By sect. 13, "An appeal from the decision of a County Court on the same grounds, and subject to the same conditions as are provided by the section 14 of the act [13 & 14 Vict. c. 61] (*c*), shall be allowed in all actions of ejectment, and in all actions in which the title to any corporeal or incorporeal hereditament shall have come in question, and, with the leave of the judge, an appeal shall be allowed in actions in which an appeal is not now allowed, if the judge shall think it reasonable and proper that such appeal should be allowed."

Appeal by motion. — There will also be a right to appeal by motion under the County Courts Act, 1875 (*d*).

The "rent payable" means as between the litigant parties, and not any rent that may be paid by a sublessee (*e*), though, if the latter rent exceeds 20*l.* that would be strong primâ facie evidence that the annual value exceeds 20*l.* The "annual value" means the actual marketable value per annum; and of this the rent at which the property would let from year to year to a suitable tenant is a fair criterion (*f*). The annual value means the annual value of the property itself, and not of the interest therein of either of the parties; so that if a ground-rent be payable thereout to a superior landlord, such ground-rent must not be taken into consideration, or deducted

(*b*) By sect. 12 of the same act, the County Courts have a like jurisdiction to try any action in which title to land comes in question, where neither the value nor the rent exceeds 20*l.* by the year.

(*c*) *Ante*, 822.

(*d*) See *ante*, 822.

(*e*) Brown *v.* Cocking, L. R., 3 Q. B. 672; 37 L. J., Q. B. 250.

(*f*) Elston *v.* Rose, L. R., 4 Q. B. 4; Re Helstone, 38 L. J., Q. B. 6.

in estimating the annual value of the property (*f*). It is to be observed, that neither the annual value nor the annual rent may exceed 20*l*., otherwise the County Court will have no jurisdiction under this act.

County Court Rules of 1875. — The Rules, Orders, and Forms, of proceedings in the County Courts which are now (1886) in force came into operation on the 2nd of November, 1875.

***County Court Rules, Ord. XXXVII. r. 25.** — By C. [*825] C. Rules, Ord. XXXVII. r. 25, "Where an action can be brought to recover possession under the provisions of the County Courts Act, 1856, no action shall be brought under the County Courts Act 1867." This rule re-enacts rule 255 of the County Court Rules of 1868 (*g*).

In what excepted cases ordinary action of ejectment may be brought. — The effect of the above rule seems to be, that the *ordinary action* of ejectment cannot be maintained in the County Court *by a landlord against a tenant*, except when the following circumstances concur, viz.: — 1. Neither the value of the property nor the rent payable in respect thereof shall exceed 20*l*. by the year (*h*). 2. It must not be a case of "holding over," after the term has expired, or been determined by a legal notice to quit, given by either party: unless, indeed, there was a fine or premium paid for the lease (*i*). 3. It must not be for non-payment of rent (*k*), whether a fine or premium was paid for the lease or not.

In these excepted cases, the landlord must follow the special procedure marked out by the County Courts Act, 1856, and the practitioner must refer to the New County Court Rules and Forms before mentioned (*l*), or to some County Court practice published in or since the year 1875.

Joinder of parties. — To return to the ordinary action under the Act of 1867. — By Ord. V. r. 10 of the C. C. Rules, it

(*g*) A doubt has arisen (see the previous edition of this work) whether this rule is consistent with 30 & 31 Vict. c. 131, s. 11 (823, *ante*). If inconsistent, the rule would not be valid. See Irving *v.* Askew, L. R., 5 Q. B. 208, where, however, the rule to which objection was taken was held valid. But it is conceived that the rule is quite valid, inasmuch as it deals with practice only. See 19 & 20 Vict. c. 108, s. 32.

(*h*) *Ante*, 823. (*k*) *Ante*, 816.

(*i*) *Ante*, 810. (*l*) *Ante*, 824.

is provided that "all persons in whom title is alleged must be joined as plaintiffs, and the person or persons alleged to be in possession or apparent possession must be defendants." Misjoinder of parties will not, however, defeat the action (Ord. XVII. r. 12).

Of causes of action. — By Ord. VI. r. 1, "No cause of action shall, unless by leave of the judge, be joined with an action for the recovery of land, except claims in respect of mesne profits, or arrears of rent in respect of the premises claimed or any part thereof, or damages for breach of any contract under which the same or any part thereof are held."

Joinder of other causes of action. — And by Rule 7 of the same Order, "If at any time it appears, or is made to appear, to the court that the causes of action united, or claims joined, in any action cannot be conveniently tried and disposed of together, it may order separate trials, or may exclude any such cause of action or claim, and may order the particulars to be amended accordingly and may make such order as to costs as may be just."

[*826] ***Description of property.** — By Ord. VII. r. 5, "Where the action is brought under sect. 11 of the County Courts Act, 1867, to recover any lands, the plaintiff shall at the time of entering the plaint file a statement in writing containing a full description of the property sought to be recovered and of the annual value thereof, and of the rent, if there be any, fixed or paid in respect thereof."

Delivery of summons to bailiff. — By Ord. VIII. r. 7, "The summons in an action brought under sect. 11 of the County Courts Act, 1867, to recover lands, shall be delivered to the bailiff forty (*m*) clear days at least before the return-day, and shall be served thirty-five clear days before the return-day thereof."

Service in case of vacant possession. — By Rule 20 of the same Order, "Where the action is to recover any lands or tenements the summons may, in case of vacant possession, or if the defendant cannot be found and his place of abode shall not be known, or admission thereto cannot be obtained for

(*m*) It is necessary to give this time to enable a defendant to avail himself of sect. 12 of 30 & 31 Vict. c. 142.

serving the summons, be served by posting a copy of such summons upon the door of the dwelling-house or other conspicuous part of the property, and such affixing shall be deemed good service on the defendant."

Appearance by person not summoned. — By Ord. IX. r. 3, "Any person not summoned as a defendant may, by leave of the registrar, appear and defend on filing an affidavit (with a copy for each plaintiff and defendant) twelve clear days before the return-day, that he is in possession, by himself or tenant, of the property or part thereof therein described; whereupon the registrar must enter the name, &c., of such person in the plaint book as an additional defendant, and send a notice, with a copy of the affidavit annexed, of such entry to the plaintiffs and original defendants ten clear days before the return-day."

Limitation of defence to part. — By Rule 4 of the same Order, "Where a defendant desires to limit his defence to a part only of the property sought to be recovered, he may give notice in writing, signed by himself or his solicitor, to the registrar, twelve clear days before the return-day, and send the same by post to the plaintiff or plaintiffs."

Equitable defence. — A defendant may rely on any equitable ground of defence against the plaintiff's claim, in which case he must, five clear days before the return-day, file a statement of the grounds he so relies on (*n*); or he may make any counter-claim against the plaintiff, in which case he must file a concise statement of the counter-claim seven clear days before the return-day (*o*). There is no rule, such as applies to joinder of causes of action by a plaintiff, forbidding any counter-claim whatever to be set up in an action for the recovery of land; but probably *if such was not [*827] connected with the plaintiff's claim, it would always be ordered to be tried separately (*p*).

Discontinuance of action by plaintiff. — By Ord. XXXVII. r. 23, "Where the plaintiff is desirous either of abandoning the action altogether or in respect of some portion of the property, he may give notice to the registrar and to the defendant by post; and after the receipt of such notice, the defendant

(*n*) Ord. IX. r. 15. (*o*) Ord. X. r. 1. (*p*) Ord. VI. r. 7; Ord. X. rr. 2, 3.

may apply for an order against the plaintiff for the costs incurred before the receipt of such notice and of attending the court on the return-day to obtain such order."

Discontinuance of action for same cause in other court. — It was held, in Bissill *v.* Williamson (*q*), that the pendency of an ejectment in one of the superior courts was not a bar to the plaintiff's proceeding in the County Court, under 19 & 20 Vict. c. 108, for recovery of possession. But now, by Ord. XVI. r. 10, "where at the return-day it shall appear that an action for the same cause, at the suit of the same plaintiff, is pending in any other court of record, the court shall order the plaint to be struck out, unless the plaintiff shall undertake to discontinue the action in such other court, before a day to be named, to which such trial shall be adjourned, and unless before such adjourned trial such action shall have been discontinued, the plaint shall then be struck out."

Confession of action by defendant. — By Rule 24 of Ord. XXXVII., "Any defendant may, at any time before the return-day, confess the action, as to the whole or any part of the lands, by signing, in the presence of the registrar or one of his clerks or a solicitor of the Supreme Court, and attested by the person in whose presence it is signed, an admission of the title of the plaintiff to the lands or to the said part thereof, and of his right to the possession thereof; and the registrar shall, upon the receipt of such admission, forthwith give notice thereof by post to the plaintiff, and the judge may, on the return-day, upon proof of the signature of the defendant or defendants to such admission by affidavit or otherwise, in case the same is not attested by the registrar or clerk, and without any further proof of the plaintiff's title (if no defendant other than the defendant signing such admission defends for the said lands or the said part thereof) give judgment for the plaintiff for the recovery of possession and costs; provided, that if the plaintiff receive notice of such admission before the return-day, he shall not be entitled as against the defendant or defendants signing to any costs in-

(*q*) 31 L. J., Ex. 131; 7 H. & N. 391. The power to make rules "for regulating the practice" of the County Courts is derived from the County Courts Act, 1856 (19 & 20 Vict. c. 108), s. 32.

curred subsequently to the receipt of such notice, except the costs of attending the court on the return-day, unless the judge shall otherwise order; provided also, that where the admission is not signed by all the defendants defending for the said lands or the said part thereof the trial shall
*proceed against these non-admitting defendants as [*828] if no admission had been signed."

A tenant served with a summons for the recovery of land, where the claim is inconsistent with the title of his landlord (*r*), should give notice to his landlord, to avoid the risk of being subject to the penalties imposed by sect. 209 of the Common Law Procedure Act, 1852.

Jury. — By Ord. XVI. r. 3, "Actions for the recovery of land or tenements . . . may, at the instance of either party, be tried by a jury."

Judgment. — By Ord. XVIII. r. 8, "Where in an action brought under sect. 11 of the County Courts Act, 1867, to recover land . . . the title of the plaintiff shall appear to have existed, as alleged in the summons, at the time of entry of the plaint, but to have expired before the return-day, the plaintiff shall be entitled to judgment according to the fact that he was so entitled, and for his costs of suit, unless the court shall otherwise order." By Rule 9 of the same order, where in a similar action "judgment is given for the plaintiff, execution may issue upon a day to be named in the judgment, and if no day be named then it may issue after the expiration of fourteen clear days from the day on which judgment shall have been given." By Rule 10, where "judgment has been obtained for the recovery of possession and costs, there may be either one warrant or separate warrants for the recovery of possession, and for the costs, at the election of the plaintiff." And by Rule 11, where "judgment is given for the defendants or any of them with costs, executions may issue for the costs against the plaintiffs upon a day to be named in the judgment, and if no day be named then it may issue after the expiration of fourteen clear days from the day on which judgment shall have been given."

By Ord. XIX. r. 29, "Where an order has been made in

(*r*) Buckley v. Buckley, 1 T. R. 647.

any action or proceeding for the delivery up to any person of lands or tenements . . . the registrar shall, upon the application of the person entitled to such possession, issue to the bailiff either a warrant of possession or warrant of assistance, as the case may require."

Costs. — By Ord. XXXVI. r. 10, "Costs in actions for the recovery of tenements . . . may, where the fees of court are paid on 5*l.* and upwards, be allowed to solicitors upon the scale applicable to actions on contract where the amount claimed exceeds 20*l.*, if the judge shall so order."

Except in so far as is specially directed by the above rules, actions of ejectment in the County Courts will follow the ordinary rules in other actions in these courts.

[*829] * SECT. 4. — *Proceedings before Justices.*

(a) *Recovery of Small Tenements wrongfully held over.*

Where term not more than 7 years, &c. — In order to save the landlords of small tenements the expense and delay of a proceeding by ejectment to recover possession, where a tenant refuses to quit at the determination of his interest in the premises, the statute 1 & 2 Vict. c. 74, sect. 1, enacts, that "when and so soon as the term or interest of the tenant of any house, land or corporeal hereditaments held by him at will, or for *any term not exceeding seven years*, either without being liable to the payment of any rent, or at a *rent not exceeding the rate of twenty pounds a year*, and upon which *no fine* shall have been reserved or made payable, shall have ended, or shall have been duly determined by a legal notice to quit or otherwise, and such tenant, or (if such tenant do not actually occupy the premises, or only occupy a part thereof) any person by whom the same, or any part thereof, shall be then actually occupied, shall neglect or refuse to quit and deliver up possession of the premises, or of such part thereof respectively, it shall be lawful for the landlord of the said premises, or his agent, to cause the person so neglecting or refusing to quit and deliver up possession to be served (in the manner hereinafter mentioned) with a written notice in the form set forth

in the schedule to this act (*s*), signed by the said landlord or his agent, of his intention to proceed to recover possession under the authority and according to the mode prescribed in this act; and if the tenant or occupier shall not thereupon appear at the time and place appointed, and show to the satisfaction of the justices hereinafter mentioned reasonable cause why possession should not be given under the provisions of this act, and shall still neglect or refuse to deliver up possession of the premises, or of such part thereof of which he is then in possession, to the said landlord or his agent, it shall be lawful for such landlord or agent to give to such justices proof of the holding and of the end or other determination of the tenancy, with the time or manner thereof; and where the title of the landlord has accrued since the letting of the premises, the right by which he claims the possession; and upon proof of service of the notice, and of the neglect or refusal of the tenant or occupier, as the case may be, it shall be lawful for the justices acting for the district, division or place within which the said premises, or any part thereof, shall be situate, in petty sessions assembled, or any two of them, to issue a warrant under their hands and seals to the constables and peace officers of the district (*t*), division or place within which the said premises, or any * part thereof, shall [*830] be situate, commanding them, within a period to be therein named, not less than **21** nor more than **30** clear days from the date of such warrant, to enter (by force if needful) into the premises, and give possession of the same to such landlord or agent: provided always, that entry upon any such warrant shall not be made on a Sunday, Good Friday or Christmas Day, or at any time except between the hours of nine in the morning and four in the afternoon: provided also, that nothing herein contained shall be deemed to protect any person, on whose application and to whom any such warrant shall be granted, from any action which may be brought against him by any such tenant or occupier, for or in respect of such

(*s*) See Form, Appendix C., Sect. 12. And see Delaney *v.* Fox, 1 C. B., N. S. 166; 2 Id. 768; 26 L. J., C. P. 5, 248.

(*t*) Jones *v.* Chapman, 14 M. & W. 124; 2 D. & L. 907.

entry and taking possession, where such person had not, at the time of granting the same, lawful right to the possession of the same premises: provided also, that nothing herein contained shall affect any rights to which any person may be entitled as outgoing tenant, by the custom of the country or otherwise."

Service on tenant of notice. — By sect. 2, "such notice of application intended to be made under this act, may be served either personally or by leaving the same with some person being in and apparently residing at the place of abode of the persons so holding over as aforesaid, and that the person serving the same shall read over the same to the person served, or with whom the same shall be left as aforesaid, and explain the purport and intent thereof; provided, that if the person so holding over cannot be found, and the place of abode of such person shall either not be known, or admission thereto cannot be obtained for serving such summons, the posting up of the said summons on some conspicuous part of the premises so held over shall be deemed to be good service upon such person."

Person obtaining warrant without right to be deemed trespasser. — By sect. 3, "in every case in which the person to whom any such warrant shall be granted had not at the time of granting the same lawful right to the possession of the premises, the obtaining of any such warrant as aforesaid shall be deemed a trespass by him against the tenant or occupier of the premises, although no entry shall be made by virtue of the warrant; and in case any such tenant or occupier will become bound with two sureties as hereinafter provided, to be approved of by the said justices, in such sum as to them shall seem reasonable, regard being had to the value of the premises and to the probable costs of an action, to sue the person to whom such warrant was granted with effect and without delay, and to pay all the costs of the proceeding in such action, in case a verdict shall pass for the defendant, or the plaintiff shall discontinue or not prosecute his action, or become nonsuit therein, execution of the warrant shall be delayed until judgment shall have been given in such action of trespass; and if upon the trial of such action of trespass a ver-

dict shall *pass for the plaintiff, such verdict and [*831] judgment thereupon shall supersede the warrant so granted, and the plaintiff shall be entitled to double costs (*u*) in the said action of trespass" (*x*).

(*u*) By 5 & 6 Vict. c. 97, a "reasonable indemnity is substituted for double costs."

(*x*) By sect. 4, "Every such bond as hereinbefore mentioned shall be made to the said landlord, or his agent, at the costs of such landlord or agent, and shall be approved of and signed by the said justices; and if the bond so taken be forfeited, or if upon the trial of the action for securing the trial of which such bond was given, the judge by whom it shall be tried shall not indorse upon the record in court that the condition of the bond hath been fulfilled, the party to whom the bond shall have been so made may bring an action, and recover thereon: provided always, that the court where such action as last aforesaid shall be brought may, by a rule of court, give such relief to the parties upon such bond as may be agreeable to justice, and such rule shall have the nature and effect of a defeazance to such bond." By sect. 5, "It shall not be lawful to bring any action or prosecution against the said justices by whom such warrant as aforesaid shall have been issued, or against any constable or peace officer by whom such warrant may be executed, for issuing such warrant or executing the same respectively, by reason that the person on whose application the same shall be granted had not lawful right to the possession of the premises." And by sect. 6, "Where the landlord at the time of applying for such warrant as aforesaid had lawful right to the possession of the premises, or of the part thereof so held over as aforesaid, neither the said landlord nor his agent, nor any other person acting in his behalf, shall be deemed to be a trespasser by reason merely of any irregularity or informality in the mode of proceeding for obtaining possession under the authority of this act, but the party aggrieved may, if he think fit, bring an action on the case for such irregularity or informality, in which the damage alleged to be sustained thereby shall be specially laid, and may recover full satisfaction for such special damage, with costs of suit: provided, that if the special damage so laid be not proved, the defendant shall be entitled to a verdict, and that if proved, but assessed by the jury at any sum not exceeding five shillings, the plaintiff shall recover no more costs than damages, unless the judge before whom the trial shall have been held shall certify upon the back of the record that in his opinion full costs ought to be allowed." By sect. 7, "The term 'landlord' shall be understood as signifying the person entitled to the immediate reversion of the premises, or, if the property be held in joint tenancy, coparcenary, or tenancy in common, shall be understood as signifying any one of the persons entitled to such reversion; and the word 'agent' shall be taken to signify any person usually employed by the landlord in the letting of the premises or in the collection of the rents thereof, or specially authorized to act in the particular matter by writing under the hand of such landlord." By 21 & 22 Vict. c. 73, ss. 1, 2, every stipendiary magistrate may do alone acts authorized to be done by two justices, including acts required to be done at petty sessions. For the forms under the act, see Appendix C., Sect. 12, *post*.

The jurisdiction of justices under this act is not outsed by the defendant bonâ fide setting up the title of a third person (*y*). The justices should hear and determine any such question.

Summary remedy against schoolmasters, &c. — A similar summary remedy is given to the guardians of the poor of any union or parish with respect to lands vested in them or under their management or control (*z*), and to the valuer under inclosure acts, in respect of encroachments and recent inclosures of land subject to the provisions of those acts (*a*). Also against schoolmasters, &c., who wrongfully hold over, after removal from their office (*b*); also to the secretary of state for war (*c*).

[*832] * (b) *Recovery of Parish Property.*

Summons before justices of permitted occupier. — The statute 59 Geo. 3, c. 12, s. 24, enacts, "that if any person, who shall have been permitted to occupy any parish or town house, or any other tenement or dwelling belonging to or provided by or at the charge of any parish for the habitation of the poor thereof, or who shall have unlawfully intruded himself or herself into any such house, tenement or dwelling, or in any house, tenement or hereditament belonging to such parish, shall refuse or neglect to quit the same, and deliver up the possession thereof to the churchwardens and overseers of the poor of any such parish, within one month after notice and demand in writing for that purpose, signed by such churchwardens and overseers, or the major part of them, shall have been delivered to the person in possession, or in his or her absence affixed on some notorious part of the premises, it shall be lawful for any two of his Majesty's justices of the peace, upon complaint to them made, by one or more of the churchwardens and overseers of the poor of the parish in which any such house, tenement or dwelling shall be situated, to issue their summons to the person against

(*y*) Rees *v.* Davies, 4 C. B., N. S. 56.

(*z*) 5 & 6 Will. 4, c. 69, s. 5.

(*a*) 15 & 16 Vict. c. 79, s. 13; see Chilcote *v.* Youldon, 29 L. J., M. C. 197.

(*b*) 23 & 24 Vict. c. 136, s. 13.

(*c*) 22 Vict. c. 12, s. 5.

whom such complaint shall be made to appear before such justices, at a time and place to be appointed by them, and to cause such summons to be delivered to the party against whom the complaint shall be made, or in his or her absence to be affixed on the premises, seven days at the least before the time appointed for hearing such complaint; and such justices are hereby empowered and required, upon the appearance of the defendant, or upon proof on oath that such summons hath been delivered or affixed as is hereby directed, to proceed to hear and determine the matter of such complaint, and if they shall find and adjudge the same to be true, then by warrant under their hands and seals to cause possession of the premises in question to be delivered to the churchwardens and overseers of the poor of the parish, or to some of them."

Summons of termor holding over. — By sect. 25, "if any person, to whom any land appropriated, purchased, or taken under the authority of this act, for the employment of the poor of any parish, or to whom any other lands belonging to such parish, or to the churchwardens and overseers thereof, or to either of them, shall have been let for his or her own occupation, shall refuse to quit and deliver up the possession thereof, to the churchwardens and overseers of the poor of such parish, at the expiration of the term for which the same shall have been demised or let to him or her, or if any person or persons shall unlawfully enter upon, or take or hold possession of any such land, or any other land or hereditaments belonging to such parish, or to the churchwardens
* or overseers, or to either of them, it shall be lawful [*833] for such churchwardens and overseers of the poor or any of them, after such notice and demand of possession as is by this act directed in the case of parish houses, to exhibit a complaint against the person or persons in possession of such land before two of his Majesty's justices of the peace, who are hereby authorized and required to proceed thereon, and to hear and determine the matter thereof; and if they shall find and adjudge the same to be true, to cause possession of such land to be delivered to the churchwardens and overseers of the poor, or some of them, in such and the like

course and manner as are by this act directed with regard to parish houses."

Upon an information and complaint, under sect. 24, by parish officers, the justices are not precluded from inquiring into the matter and determining thereon, by reason of the defendant claiming title to the property on behalf of himself or the person by whom he was put into possession (*d*).

If a person "permitted to occupy" within the terms of the statute desert the premises, the parish officers may resume possession, as at common law, without any notice to quit, or resort to procedure under the statute (*e*); but where a person has been let into possession of a house belonging to the parish, by the parish officers, as an ordinary tenant, they cannot proceed against him to recover possession under the 24th section of this statute (*f*). Waste land of a parish, into the occupation of which a person has been let under licence of the majority of the parish freeholders, under an agreement to pay rent to churchwardens and overseers in aid of the poor rates, is parish land, which they may recover, under sect. 24 of the above act, after notice and demand of possession; and indeed it appears possible that they might in such a case expel the tenant without resorting to the statutory procedure (*g*).

(c) *Recovery of Cottage Allotments.*

By 2 & 3 Will. 4, c. 42, power is given in parishes inclosed under acts of parliament, in which allotments have been made for the benefit of the poor, for the trustees of the allotments and parish officers in vestry assembled, to let them in small portions to industrious cottagers.

Notice to quit where rent in arrear for 4 weeks. — By sect. 5, "if the rent is in arrear for four weeks, or if, at the end of any year of occupation, it is the opinion of the vestry [*834] that the land * has not been duly cultivated, the churchwardens or overseers, or any or either of them,

(*d*) *Ex parte* Vaughan, L. R., 2 Q. B. 114; 36 L. J., M. C. 17; 7 B. & S. 902.

(*e*) Wildbor *v.* Rainforth, 8 B. & C. 4.

(*f*) Reg. *v.* Middlesex JJ., 7 Dowl. 767; Reg. *v.* Bolton, 1 Q. B. 66.

(*g*) See, *per* Byles, J., Appleton *v.* Morrey, 2 F. & F. 167.

with the consent of the vestry, may serve a notice to quit upon the occupier, who shall deliver up possession within one week after notice."

By sect. 6, "if any person to whom such portion of land as aforesaid shall have been let, for his or her own occupation, shall refuse to quit and deliver up possession thereof when thereto required, according to the terms of this act, or if any other person or persons shall unlawfully enter upon, or take or hold possession of any such land, it shall be lawful for the churchwardens and overseers of the poor, or any or either of them, to exhibit a complaint against the person so in possession of such land before two of his Majesty's justices of the peace, who are hereby authorized and required to issue a summons, under their hands and seals, to the person against whom such complaint shall be made, to appear before them at a time and place appointed therein; and such justices are hereby required and empowered, upon the appearance of the defendant before them, or upon proof on oath that such summons has been duly served upon him, or left at his usual place of residence, or if there should have been any difficulty in finding such usual place of residence, then upon proof on oath of such difficulty, and that such summons has been affixed on the door of the parish church of the said parish in which such land is situated, and in any extra-parochial place on some public building or other conspicuous place therein, to proceed to hear and determine the matter of such complaint; and if they shall find and adjudge the same to be true, then, by warrant under their hands and seals, to cause possession of the land in question to be delivered to the churchwardens and overseers of the poor, or to some of them." By sect. 11, the powers and provisions of the act, so far as they are applicable, may be applied in cases where inclosures are made under 1 & 2 Will. 4, cc. 42, 59, by which the powers of 59 Geo. 3, c. 12, for taking land for the benefit of the poor are extended, or where land shall in any other manner be found appropriated for the general benefit of the poor of any parish.

Allotment gardens under Inclosure Acts. — By the General Inclosure Act (8 & 9 Vict. c. 118), power is given to the

inclosure commissioners to appropriate a portion of lands inclosed for the purpose of letting it in gardens, not exceeding one quarter of an acre each, to the poor; and by sect. 110, "if the rent reserved upon the letting of any garden by the allotment wardens shall at any time be in arrear for forty days, or if at any time during the tenancy, being not less than three calendar months after the commencement thereof, it shall appear to the allotment wardens that the occupier of such garden shall not have duly observed the terms and conditions of his tenancy, or shall have gone to reside more than one mile out of the parish, then and in every [*835] such case the allotment * wardens shall serve a notice upon such occupier, or, in case he shall have gone to reside out of the parish, shall affix the same to the door of the church of the parish, determining the tenancy at the expiration of one month after such notice shall have been so served or affixed, and thereupon such tenancy shall be determined accordingly: provided always, that in every such case the allotment wardens or their incoming tenant shall pay to the occupier, whose tenancy shall have been so determined, a fair recompense in money for any crops (not being crops prohibited by the terms of such tenancy) which may be growing on such garden at the time of such determination, and for any manure left on such garden, or any benefit accruing from the manuring of such garden to the wardens or their incoming tenant; and the justices, to whom application may be made for a warrant to give possession of such garden, shall settle the amount of such recompense, in case the parties differ about the same, and stay the execution of such warrant until the same shall have been paid or tendered, or (in case such occupier be absent) until the payment thereof shall have been secured to the satisfaction of such justices."

Recovery of allotment garden. — By sect. 111, "in case, upon the determination of any such tenancy as aforesaid, the occupier of any such garden shall refuse to quit and deliver up possession thereof, or if any other person shall unlawfully enter upon, take or hold possession of any such garden, or of any part of such allotment, the allotment wardens may recover possession according to the mode prescribed by the statute 1 &

2 Vict. c. 74 (*h*), in such and the same manner as if the said wardens were landlords or a landlord, and as if such overholding occupier or other person were a tenant neglecting or refusing to quit and deliver up possession within the meaning of the last-mentioned act."

Poor Allotments Management Act, 1873. — Both the above acts, the act 2 & 3 Will. 4, c. 42, and the act 8 & 9 Vict. c. 118, were amended by the Poor Allotments Management Act, 1873 (36 Vict. c. 19). That statute provides that the allotment trustees and the vestry may appoint a committee for the purpose of exercising their powers.

Notice by committee. — By sect. 11, "the notice to quit mentioned," in 2 & 3 Will. 4, c. 42, "may be given by a committee under the hands of any three of its members for any cause deemed by it sufficient and proper, and shall operate and have effect in the same manner and to the same extent as a notice to quit given for any such cause as in that section mentioned."

(d) *Recovery of Deserted Premises* (*i*).

By 11 Geo. 2, c. 19, s. 16, "if any tenant holding any lands, tenements or hereditaments, *at a rack-rent*, or, where the rent reserved shall *be *full three-fourths of the* [*836] *yearly value* of the demised premises, who shall be in arrear for one year's rent (extended by 57 Geo. 3, c. 52, to one half-year's rent, although no express right of re-entry be reserved), shall *desert* the demised premises, and leave the same *uncultivated or unoccupied* (*k*), *so as no sufficient distress can be had to countervail the arrears of rent*, it shall and may be lawful to and for two or more justices of the peace of the county, riding, division or place (having no interest in the demised premises), at the request of the lessor or landlord, lessors or landlords, or his, her or their bailiff or receiver, to go upon and view the same, and to affix or cause to be affixed on the most notorious part of the premises, notice in writing

(*h*) *Ante*, 829.
(*i*) See Cole Ejec. Chap. LXXII.
(*k*) See *Ex parte* Pilton, 1 B. & A. 369, and 838 (*x*), *post*.

what day (at the distance of **14** days at least (*l*)) they will return to take second view thereof; and if upon such second view the tenant, or some person on his or her behalf, shall *not appear and pay the rent in arrear*, or there shall not be sufficient distress upon the premises, then the said justices may put the landlord or landlords, lessor or lessors, into the possession of the said demised premises; and the lease thereof to such tenants, *as to any demise therein contained only, shall from thenceforward become void.*"

Complaint need not be on oath. — This statute, which gives a summary remedy to landlords, does not require the request or complaint to be made *upon oath:* therefore, where in trespass against two magistrates for turning a tenant out of possession under this act, a record of the proceedings, drawn up conformably to the statute, was given in evidence, it was held, that it was a complete defence to the action, though they did not appear to have acted on the oath of the landlord (*m*). In this and all other like cases the justices ought to make a record of the whole proceedings (*n*).

Appeal to judges of assize, &c. — Sect. 17 provides, "that such proceedings of the said justices shall be examinable in a summary way by the next justice or justices of assize (*o*) of the respective counties in which such lands or premises lie; and if they lie in the city of London or county of Middlesex, by the judges of the Courts of Queen's Bench or Common Pleas, who are hereby respectively *empowered to order restitution to be made to such tenants, together with his or her expenses and costs*, to be paid by the lessor or landlord, lessors or landlords, if they shall see cause for the same: and, in case [*837] they shall affirm the act of the said justices, to *award costs not exceeding five pounds for the frivolous appeal." This section will still apply, but with such alterations

(*l*) *I.e.*, fourteen clear days; Creak *v.* The Justices of Brighton, 1 F. & F. 110. See form of notice, 3 Burn's J. 194 (30th ed.).

(*m*) Basten *v.* Carew, 3 B. & C. 649.

(*n*) Ashcroft *v.* Bourne, 3 B. & Adol. 684; Haylock *v.* Sparke, 1 E. & B. 471; Creak *v.* The Justices of Brighton, 1 F. & F. 110; Cole Ejec. 678, 844.

(*o*) This appeal must be made to the judge or judges going the circuit, in their individual capacity; not as justices of assize; Reg. *v.* Sewell, 8 Q. B. 161.

as are required by the altered state of the courts, and the appeal in London or Middlesex will therefore lie to any judge of the Queen's Bench Division of the High Court of Justice (*p*).

Right of re-entry unnecessary. — It having been decided that the 11 Geo. 2, c. 19, s. 16, did not apply to cases where the landlord had not, by the terms of the lease, a right of entry (*q*), the statute 57 Geo. 3, c. 52, extended the powers thereby given to the case of tenants "who shall hold such lands and tenements or hereditaments under any demise or agreement either written or verbal, and although no right or power of re-entry be reserved or given to the landlord in case of non-payment of rent." Since this enactment a right of entry is clearly unnecessary (*r*).

Within the metropolitan police district. — Where the premises are within the metropolitan police district, the 3 & 4 Vict. c. 84, enacts (sect. 13), that, after the passing of that act, "none of the police magistrates within the metropolitan police district shall be required to go upon any deserted lands, tenements or hereditaments, for the purpose of viewing the same, or affixing any notices thereon, or of putting the landlord or landlords, lessor or lessors, into the possession thereof," under the provisions of 11 Geo. 2, c. 19, and 57 Geo. 3, c. 52, "but that in every case within the metropolitan police district in which by the said acts or either of them, two justices are authorized to put the landlord or lessor into the possession of such deserted premises, it shall be lawful for one of the police magistrates, upon the request of the lessor or landlord, or his or her bailiff or receiver, made in open court, and upon proof given to the satisfaction of such magistrate of the arrear of rent and desertion of the premises by the tenant as aforesaid, to issue his warrant, directed to one of the constables of the metropolitan police force, requiring him to go upon and view the premises, and to affix thereon the like notices as under the said acts, or either of them, are

(*p*) By virtue of an Order in Council of 16th December, 1880, under sect. 32 of the Judicature Act, 1873.

(*q*) Easter T. 41 Geo. 3, MS.; *Ex parte* Pilton, 1 B. & A. 369.

(*r*) Edwards *v.* Hodges, 15 C. B. 477.

required to be affixed by two justices of the peace; and upon the return of the warrant, and upon proof being given to the satisfaction of the magistrate before whom the warrant shall be returned that it has been duly executed, and that neither the tenant, nor any person on his or her behalf, has appeared and paid the rent in arrear, and that there is not sufficient distress upon the premises, it shall be lawful for such magistrate to issue his warrant to a constable of the metropolitan police force, requiring him to put the landlord or lessor into the possession of the premises; and every constable to whom any such warrant shall be directed shall duly execute [*838] and return the same, * subject to the provisions contained" in 2 & 3 Vict. c. 47, "as to the execution of warrants directed to constables of the metropolitan police force; and upon the execution of such second warrant, the lease of the premises to such tenant, as to any demise therein contained only, shall thenceforth be void."

City of London. — By 11 & 12 Vict. c. 43, s. 34, "it shall be lawful for the Lord Mayor of the city of London, or for any alderman of the said city, for the time being, sitting at the Mansion House or Guildhall Justice Rooms in the said city, to do alone any act, at either of the said justice rooms, which by any law now in force, or by any law not containing an express enactment to the contrary hereafter to be made, is or shall be directed to be done by one or more justice." This applies to proceedings in the city of London under the before-mentioned acts (*s*). But although such mayor or alderman sitting as aforesaid has all the power of two justices, yet he has not the power of a metropolitan police magistrate acting under 3 & 4 Vict. c. 84, s. 13 (*s*), and therefore he cannot send a constable to view the premises, and to affix notices, &c., but he must proceed in like manner as two or more justices.

Stipendiary magistrates. — A stipendiary magistrate in any city, town, liberty, borough or place (other than the city of London, or the metropolitan police district) should proceed in like manner as two or more justices (*t*).

(*s*) Edwards *v.* Hodges, 15 C. B. 477.

(*t*) 11 & 12 Vict. c. 43, s. 33.

Cases within the acts for recovery of deserted premises. — The foregoing statutes do not contain any exception with respect to leases made in consideration of any fine or premium. Therefore, any such fine or premium is immaterial except so far as it tends to show that the rent reserved is not a rack-rent or not full three-fourths of the yearly value of the demised premises (*u*). The statutes apply to all demises, whether written or oral, however long may be the term and however large may be the amount of rent reserved (*x*). It is no longer of any consequence that the lease or agreement contains no condition or proviso for re-entry for nonpayment of rent (*y*); and therefore this mode of proceeding may sometimes be adopted where no action for recovery of land could be supported, either in the High Court or in the County Court. But the following circumstances must concur, viz.: — 1. The rent reserved must be a rack-rent, or full three-fourths of the yearly value of the demised premises. 2. One-half a year's rent at the least must be in arrear. 3. The premises must have been deserted and left uncultivated or unoccupied, so as no sufficient distress can be had to countervail the arrears of rent. No information or complaint on oath need be made before the justices: a mere request * is sufficient (*z*). But upon an appli- [*839] cation to a *metropolitan* police magistrate, proof must be made to his satisfaction of the rent in arrear and desertion of the premises by the tenant (*a*). The justices are upon their own view to determine whether the premises are deserted or not (*b*): also, whether they have been left uncultivated or unoccupied so as no sufficient distress can be had to countervail the arrears of rent: also, whether the rent reserved is a rack-rent or full three-fourths of the yearly value of the demised premises. Upon these points they may, if they think fit, receive the evidence or statements of any broker, surveyor, or other competent person, or of the

(*u*) See Cole Ejec. 676.
(*x*) *Ex parte* Pilton, 1 B. & A. 369.
(*y*) 57 Geo. 3, c. 52; *ante*, 836; Edwards *v.* Hodges, 15 C. B. 477.
(*z*) Basten *v.* Carew, 3 B. & C. 649. See also *Re* Perham, 5 H. & N. 30; 11 & 12 Vict. c. 43, s. 10.
(*a*) 3 & 4 Vict. c. 84, s. 13; *ante*, 837.
(*b*) Basten *v.* Carew, *supra*.

landlord or his bailiff or receiver: but they ought to form their own judgment or conclusion (*c*). It has been decided, where a tenant ceased to reside on the premises for several months, and left them without any furniture or sufficient other property to answer the arrears of rent, that the landlord might properly proceed under the statute to recover the possession, although he knew where the tenant then was, and although the justices found a servant of the tenant on the premises when they first went to view the same (*d*). On the other hand, in a case where the wife and children of the tenant remained on the premises, but there was no furniture in the house, except three or four chairs, which were stated by the wife to belong to a neighbour: held, by the justices of assize on appeal (reversing the decision of the justices), that the premises had not been *deserted* within the meaning of the act (*e*). Where magistrates had given possession of a dwelling-house as *deserted* and unoccupied, and the judges of assize, on appeal, made an order for restitution with costs, and the tenant brought an action of trespass for the eviction against the magistrates, the constable, and the landlord; it was held, that the record of the proceedings before the magistrates was an answer to the action on behalf of all the defendants (*f*). The proper remedy is to appeal against the decision of the justices pursuant to 11 Geo. 2, c. 19, s. 17 (*g*).

The order of the judges of assize on appeal should be directed to the justices from whom the appeal comes, as the court have refused a mandamus to compel the justices of the peace to cause restitution to be made, in conformity with an order of the justices of assize on appeal, where the order was not being directed to any one (*h*). Formerly the court would not compel justices to act, who doubted their jurisdiction, though incorrectly (*i*).

(*c*) See Cole Ejec. 677.

(*d*) *Ex parte* Pilton, 1 B. & A. 369. See also Taylerson *v.* Peters, 7 A. & E. 110; decided under 8 Anne, c. 14, ss. 6, 7.

(*e*) Ashcroft *v.* Bourne, 3 B. & Adol. 684.

(*f*) Ashcroft *v.* Bourne, *supra*; Basten *v.* Carew, 3 B. & C. 649.

(*g*) *Ante*, 836; Reg. *v.* Sewell, 8 Q. B. 161.

(*h*) Reg. *v.* Traill, 12 A. & E. 761.

(*i*) *Ex parte* Fulder, 8 Dowl. 535; *Ex parte* William Davy, 2 Dowl., N.

*If the magistrates have a record of their proceed- [*840]
ings under this act drawn up, it will be an answer to any action of trespass brought against them or the landlord or constable who took possession, notwithstanding there may have been a successful appeal against the order (*k*).

S. 24. But now see 11 & 12 Vict. c. 44, s. 5; Reg. *v.* Cotton, 15 Q. B. 574, Coleridge, J.; Reg. *v.* Ingham, 17 Q. B. 884.

(*k*) See Ashcroft *v.* Bourne, *supra*; Reg. *v.* Sewell, *supra*; *per* Abbott, C. J., in Basten *v.* Carew, *supra*.

*CHAPTER XXIII.

CRIMINAL LAW AFFECTING LANDLORD OR TENANT.

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SECT. 1. — *Letting infected Houses or Lodgings.*

Public Health Act 1875. — By sect. 128 of the Public Health Act (*a*), 1875 (38 & 39 Vict. c. 55), "any person who knowingly lets for hire any house, room, or part of a house in which any person has been suffering from any dangerous infectious disorder, without having such house, room, or part of a house, and all articles therein liable to retain infection, disinfected to the satisfaction of a legally-qualified medical practitioner, as testified by a certificate signed by him, such person shall be liable to a penalty not exceeding twenty pounds. For the purpose of this section the keeper of an inn shall be deemed to let part of a house to any person admitted as a guest into such inn." And by sect. 129, "any person letting for hire or showing for the purpose of letting for hire any house or part of a house, who, on being questioned by any person negotiating for the hire of such house or part of a house as to the fact of there being, or within six months previously having been, therein any person suffering from any dangerous infectious disorder, knowingly makes a false answer to such a question, shall be liable at the discretion of the court to a penalty not exceeding twenty pounds, or to imprisonment with or without hard labour for a period not exceeding one month."

(*a*) This act (sect. 2) does not apply to the metropolis. As to the metropolis, see Sanitary Act, 1866 (29 & 30 Vict. c. 90), s. 39, which differs slightly from the corresponding section of the Public Health Act.

Sect. 2. — *Letting House as a Brothel.*[1]

The Criminal Law Amendment Act, 1885 (48 & 49 Vict. c. 69), contains very stringent provisions against the user of a house as a *brothel. By sect. 13, any per- [*842] son "who being the lessor or landlord of any premises, or the agent of such lessor or landlord, lets the same or any part thereof with the knowledge that such premises or some part thereof are or is to be used as a brothel, or is wilfully a party to the continued use of such premises or any part thereof as a brothel," is liable on summary conviction to a fine not exceeding twenty pounds, or to imprisonment for not more than three months with or without hard labour.

The words "is wilfully a party to the continued use," &c.,

[1] **Letting houses for brothels, gambling houses, drinking saloons, &c.** — (*a*) *Brothels* are usually declared by the statutes of the different states to be nuisances.

By the following, among others, the leasing of premises (knowingly) to be used as houses of ill-fame is declared criminal: viz., Wisconsin (Rev. Sts. 1878, sec. 4589, punishable by imprisonment, not less than six months, nor more than one year, or by fine not exceeding $500, nor less than $100); Wyoming (Rev. Sts. sec. 997, punishable by fine not exceeding $100, or imprisonment not exceeding six months, or by both); Kansas (Comp. Laws, 1885, sec. 2104, imprisonment not exceeding three months, or fine not exceeding $500, or both); Iowa (2 Rev. Code, 1880, sec. 4015, fine not exceeding $300, or imprisonment not exceeding six months); Michigan (2 Gen. Sts. sec. 9288, fine not exceeding $300, or imprisonment not more than three months), Nebraska (Crim. Code, ch. 20, sec. 210); New York (Penal Code, sec. 322); Rhode Island (Pub. Sts. ch. 80, sec. 5); Massachusetts (Pub. Sts. 1882, ch. 101, sec. 6); Maine (Rev. Sts. 1883, ch. 17, sec. 4).

In many of these states it is declared that lessee upon conviction of keeping such a house shall forfeit his lease. Such is the law, among other states, in Wisconsin, Tennessee, Kansas, Connecticut, Iowa, Minnesota, Nebraska, Rhode Island, Massachusetts and Maine. In several of these states it is provided that the lease in such cases is void *at the option of the lessor.*

Gambling houses, drinking saloons, &c. — Many of the states have similar statutes in regard to gambling houses, saloons for illegal sale of liquors, &c.

In New York the knowingly letting of premises to be used for baiting or fighting animals or birds (Penal Code, sec. 665), or for lotteries (sec. 333), is declared criminal.

In Ohio a lessor who knows that the demised premises are used for gambling purposes is criminally liable if he fails to complain against it. 2 Rev. Sts. 1880, sec. 6932.

In Vermont it is provided (Rev. Laws, 1880, sec. 3842) that if a lessee use the demised premises for the illegal sale of intoxicating liquors, the lessor may enter without process of law, or may recover possession by legal proceedings.

would seem to render any landlord liable under the section who, having the knowledge therein described, and having also the power to give the tenant notice to quit, should abstain from giving such notice immediately on becoming possessed with reasonable certainty of such knowledge.

SECT. 3. — *Larceny by Tenants or Lodgers.*

Stealing chattels or fixtures. — By 24 & 25 Vict. c. 96, s. 74, "whoever shall *steal any chattel or fixture*[1] let to be used by him or her in or with any house or lodging, whether the contract shall have been entered into by him or her or by her husband or by any person on behalf of him or her or her husband, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping; *and in case the value of such chattel or fixtures shall exceed the sum of 5l.*, shall be liable, at the discre-

[1] **Larceny of fixtures in America.** — For a discussion of the nature of fixtures (both removable and irremovable) in America, see *ante*, ch. 16, sec. 8, notes.

Many of the states have by express statutes declared the stealing of fixtures to be larceny. Among other states New Hampshire (Gen. Sts. 1878, ch. 278, sec. 12); Massachusetts (Pub. Sts. 1882, ch. 203, sec. 27); New York (Penal Code, sec. 537); New Jersey (1 Rev. Stat. of 1877, p. 252, sec. 142); Pennsylvania (1 Brightley's Purdon's Dig. pp. 435, 436, sec. 175); Virginia (Code, 1887, sec. 3710); West Virginia (Code, 1887, ch. 145, sec. 17); Maryland (Rev. Code, 1878); Georgia (Code, 1882, sec. 2220); Mississippi (Rev. Code, 1880, sec. 2905); Illinois (1 Rev. Sts. ch. 38, sec. 227); Kansas (Comp. Laws, 1885, sec. 1939); Dakota (Penal Code, sec. 591); Idaho (Rev. Sts. 1887, sec. 7056); Utah (Comp. Laws, 1876, sec. 2114).

Several of the provisions above referred to are peculiarly worded, and possibly do not extend to all fixtures. As some of the states do not appear to have any similar provisions, prosecutions for feloniously taking fixtures (at least if they were irremovable ones) must in such states be in some other form than for larceny.

Removable fixtures, while still annexed, are held in some of the states to be parts of the realty, and of course are not the subjects of larceny.

In states where removable fixtures are considered to be personalty it is possible a prosecution for larceny might be sustained without express statutory authority, even though the taking and the severance were simultaneous. The law is otherwise in England and in some of the states.

tion of the court, to be kept in penal servitude for any term not exceeding seven years and not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping; and in every case of stealing any chattel in this section mentioned it shall be lawful to prefer an indictment in the common form as for larceny; and in every case of stealing any fixture in this section mentioned, to prefer an indictment in the same form as if the offender were not a tenant or lodger; and in either case to lay the property in the owner or person letting to hire."

Lodging-house keeper not responsible for goods of lodger stolen. — The law implies no obligation upon a lodging-house keeper to take care of the goods of his lodger. Where, therefore, certain property of a lodger who was about to quit had been stolen by a stranger, who in his absence was permitted by the occupier of the house to enter the * rooms for the purpose of viewing them: it was [*843] held, that the lodging-house keeper was not responsible for the loss (*b*).

Sect. 4. — *Injuries to Buildings by Tenants.*

Pulling down or demolishing all or part of any building or fixture. — By 24 & 25 Vict. c. 97, s. 13, "whosoever, being possessed of any dwelling-house or other building, or part of any dwelling-house or other building, held for any term of years, or other less term, or at will, or held over after the determination of any tenancy, shall unlawfully and maliciously pull down and demolish, or begin to pull down or demolish, the same or any part thereof, or shall unlawfully and maliciously pull down or sever from the freehold any fixture being fixed on or to such dwelling-house or building, or part of such dwelling-house or building, shall be guilty of a misdemeanor."

(*b*) Holder *v.* Soulby, 8 C. B., N. S. 254; 29 L. J., C. P. 246; Dansey *v.* Richardson, 3 E. & B. 144.

Sect. 5. — *Forcible Entry and Detainer* (*c*) [1].

Nature and punishment of the offence by indictment. — The offence of forcible entry and detainer is defined to be the

(*c*) See Beddall *v.* Maitland, 17 Ch. D. 174; 2 Burn's J. 590—614 (30th ed.).

[1] **Forcible entry and detainer in America.** — (*a*) An indictment lies for this offence, both at common law (2 Whart. Crim. Law (8th ed.) sec. 1083 *et seq.*; State *v.* Jones, 14 S. C. 344; Harding's Case, 1 Greenl. (Me.) 27; Commonwealth *v.* Shattuck, 4 Cush. 141); and in some of the states by statutes.

In Massachusetts (Pub. Sts. ch. 126), Illinois (Rev. Sts. ch. 57, sec. 1) and in many other states there are prohibitions sufficient to make forcible entries criminal, but not providing any statutory penalties. In some of the other states, as Pennsylvania (1 Brightley's Purdon's Digest, pp. 406, 407, sec. 27) and California (Penal Code, sec. 418), &c., the penalty is fixed by statute. In some of the states restitution is granted under proceedings by indictment. "In many of the states, through the substitution of statutory remedies," giving relief by civil action, criminal proceedings have fallen into disuse. 2 Whart. Crim. Law, sec. 1083. In some of them the remedy is a proceeding, partly civil and partly criminal.

The majority of the statutory proceedings, however (as, for example, Pub. Sts. Mass. ch. 175 and 1 Rev. Sts. Ill. ch. 57, sec. 2), are purely civil proceedings to recover possession of the premises. Where the proceedings are semi-civil and semi-criminal, the rule of evidence as to the degree of force is the same on both the civil and criminal sides (Cowen, J., in Willard *v.* Warren, 17 Wend. (N. Y.) 257, 261); and doubtless the same rule prevails when the proceedings are separate.

It should be borne in mind, however, that several of the states have new provisions under which restitution may be obtained, though the force used in entering was only constructive (*i.e.*, entries contrary to the wills of the occupants). See *ante*, ch. 22, sec. 1, note, "Proceedings for recovery," &c., subtitle (*e*), "Peculiar statutes in some of the American states."

(*b*) *Degree of force essential to constitute forcible entry and detainer.* — The statutes of some of the states have quite full definitions of these offences, as Pennsylvania (Brightley's Purdon's Digest, pp. 406, 407, sec. 27); others merely characterize them (see Pub. Sts. Mass. ch. 126, sec. 15, and 1 Rev. Sts. Ill. ch. 57, sec. 1) as entries "by force," or not "in a peaceable manner."

The act must in all cases exceed a mere trespass. 2 Bishop on Crim. Law (7th ed.) sec. 505; Merrill *v.* Forbes, 23 Cal. 379. Constructive force is not sufficient to constitute it. Harding's case, 1 Greenl. (Me.) 27 (*per* Preble, J.); Commonwealth *v.* Shattuck, 4 Cush. (Mass.) 141 (*per* Dewey, J.); Greer *v.* Wroe, 1 Sneed (Tenn.) 246; The People *v.* Smith, 24 Barb. (N. Y.) 16; Hendrickson *v.* Hendrickson, 12 N. J. L. 202; Butts *v.* Voorhees, 13 N. J. L. 13, 22.

In Missouri constructive force is held sufficient in civil proceedings, and it has sometimes been so held in Illinois. See *ante*, ch. 22, sec. 1, note, "Proceedings for recovery," &c., subtitle (*e*), "Peculiar statutes."

Wharton says, "An entry where personal violence is done . . . is a forcible entry." 2 Whart. Crim. Law. (8th ed.) sec. 1094.

Breaking and entering. — It has been said that "An entry by breaking the doors or windows, &c., whether any person be in the house or not, especially

violent taking or keeping possession of land and tenements, with menaces, force and arms, and without the authority of

if it be a dwelling-house, is a forcible entry within the statute. 2 Whart. Crim. Law (8th ed.) sec. 1094; Davidson *v.* Phillips, 9 Yerg. (Tenn.) 93 (a party found within the building after it had been locked against him was presumed to have made a forcible entry); Jarvis *v.* Hamilton, 19 Wis. 187; Mason *v.* Powell, 38 N. J. L. 576; Commonwealth *v.* Rees, 2 Brewst. (Pa.) 564, 565; State *v.* Fort, 4 Dev. & Batt. (N. C.) 192, 193.

It has been many times held that if a servant or member of occupant's family is present, the entry is forcible. State *v.* Shepard, 82 N. C. 614; State *v.* Caldwell, 2 Jones (N. C.) L. 468.

Entry upon an unoccupied and unfastened dwelling-house in the night-time was held not a forcible entry in Foster *v.* Kelsey, 36 Vt. 199, 202; but an entry in the night into an occupied building, accompanied by four or five men, was held forcible in Scarlett *v.* Lamarque, 5 Cal. 63.

In Pike *v.* Witt, 104 Mass. 595, entry without consent into a locked room in a mill through a hole in the floor, and removal thereafter of the fastening by the use of an axe, was held not forcible.

Entry into a house after trespasser had previously broken the doors, and left them open, was held not forcible in Greer *v.* Wroe, 1 Sneed (Tenn.) 246; or entry through doors left open by former occupant (Hopkins *v.* Calloway, 3 Id. 11). Entry and removal of occupant's furniture in his absence was held not forcible in Powell *v.* Lane, 45 Cal. 677.

Entries, surreptitiously obtained, have sometimes been held forcible. Burt *v.* State, 2 Treadw. (S. C.) Const. 489.

Entry upon lands enclosed with a fence in absence of occupant is not a forcible entry. Polock *v.* McGrath, 25 Cal. 54.

Threats. — In Pennsylvania *v.* Robinson, Addison, 14, 17, President Addison said, "As to the force in the entry, &c., there must be, at least, such acts of violence or such threats, menaces, signs or gestures as may give ground to apprehend personal injury or danger, in standing in defence of the possession."

The same judge said, in Pennsylvania *v.* Waddle, Id. 41, 42, "Words are the slightest symptoms of force. If you think it was the meaning and tendency of the words to impress on Johnson a terror of personal harm, if he should proceed to take possession, this is force," &c.

"Whether threats were used is a question for the jury." Savage, Ch. J., in People *v.* Rickert, 8 Cow. (N. Y.) 226. In that case the jury found that the words, "It will not be well for you, if you ever come upon the premises again, day or night," constituted the detainer forcible.

In Hodgkins *v.* Jordan, 29 Cal. 577, the declaration that one would stay upon the premises till put off by force was held not to constitute the offence of forcible detainer; and in Frazier *v.* Hastler, 5 Id. 156, the plaintiff said he should have to send some men to remove the building (erected by defendant); and defendant answered that there were not men enough in San Francisco to do it. It was held not a forcible detainer.

In McMinn *v.* Bliss, 31 Cal. 122, defendant's declaration that they "intended to . . . maintain possession . . . by force and at all hazards" was held not necessarily to constitute the offence. Likewise (in Brick *v.* Middleton, 12 N. J. L. 266) the statement that "he would fight as long as he had a drop of blood in his veins . . . before he would give up the property" did not.

the law (*d*). This was formerly permitted, under certain circumstances, where a person had been disseised or put out of possession (*e*); but being found very prejudicial to the public peace, it was thought necessary, by various statutes (*f*), to restrain all persons whatever from the use of such violent methods to do themselves justice. Although a man may arm himself and his friends for the defence of the possession of his house against such as threaten to make an unlawful entry, he cannot lawfully do the same in defence of his close (*g*). The indictment for forcible entry into *leasehold* premises is founded on 21 Jac. 1, c. 15; for a forcible detainer, on 8 Hen. 6, c. 9, or 21 Jac. 1, c. 15. An indictment lies also at common law for a forcible entry, although it is generally brought on the acts of parliament (*h*).

[*844] No expulsion *or detainer in this case needs be proved, because no restitution can be awarded (*i*).

The tenement in which the force was made must be described with convenient certainty; and the indictment must set forth, that the defendant actually entered, and ousted the party grieved, and continued his possession at the time of finding the indictment, otherwise he cannot have restitution, because it does not appear that he needs it (*k*). If, however, a man's wife, children, or servants continue in the house, or upon the land, he is not ousted of his possession; but his cattle being upon the ground do not preserve his possession (*l*). A repugnancy in setting forth the offence in an in-

(*d*) 4 Blac. Com. 148.

(*e*) 1 Hawk. P. C. c. 64, s. 1; 1 Russ. on Crimes, 421 (4th ed.).

(*f*) 5 Ric. 2, st. 1, c. 8; 15 Ric. 2, c. 2; 8 Hen. 6, c. 9; 31 Eliz. c. 11; 21 Jac. 1, c. 15; 2 Chit. Stat. (4th ed.) at p. 514, tit. "Criminal Law" (offences against Peace, &c.); 1 Russ. on Crimes, Ch. XXIX.; 2 Burn's J. 592—595 (30th ed.).

(*g*) Rex *v.* Bishop of Bangor, 1 Russ. on Crimes, 388 (*g*) (4th ed.)

(*h*) Rex *v.* Baker, 3 Burr. 1731.

(*i*) Rex *v.* Wilson, 8 T. R. 357.

(*k*) Hawk. P. C. c. 64, ss. 37, 41.

(*l*) Dalt. c. 132.

In the following cases threats, in combination with other circumstances, were held sufficient: Holmes *v.* Holloway, 21 Tex. 658; Verhook *v.* Story, 4 Hump. (Tenn.) 59; Harrow *v.* Baker, 2 G. Greene (Iowa) 201; O'Callaghan *v.* Booth, 6 Cal. 63.

Mere intruders cannot maintain the action. — Hodgkins *v.* Price, 132 Mass. 196; The People *v.* Field, 52 Barb. (N. Y.) 198, 211; State *v.* Pollock, 4 Ire. (N. C.) L. 305.

dictment upon any of the statutes is an incurable fault (*m*): an indictment for forcible entry was quashed, therefore, for not setting forth that the party was seised or disseised; or what estate he had in the tenement; for if he had only a term for years, then the entry must be laid into the freehold of A., in the possession of B. (*n*). Upon the finding by the grand jury of the indictment, the judge of assize has a discretion to refuse to award restitution (*o*).

Punishment of the offence by justices. — By 8 Hen. 6, c. 9, for a more speedy remedy, the party grieved may complain to any one justice, or to a mayor, sheriff or bailiff within their liberties. Concerning which power of the justice, it is enacted as follows: — After complaint made to such justice, by the party grieved, of a forcible entry made into lands, tenements or other possessions, or forcibly holding thereof, he shall, within a convenient time, at the costs of the party grieved (without any examining or standing upon the right or title of either party), take sufficient power of the county, and go to the place where the force is made (*p*). All people of the county, as well the sheriff as others, shall be attendant on the justices, to arrest the offenders, on pain of imprisonment and fine to the Queen: and if the doors be shut, and they within the house shall deny the justice to enter, it seems he may break open the house to remove the force (*q*): if, after the entry made, the justice "shall find such force, he shall cause the offenders to be arrested;" and the offenders being arrested, they shall be put in the next gaol, there to abide convict by the record of the same justice, until they have made fine and ransom to the Queen (*r*). The justice ought to "make a record of such force by him viewed:" which record shall be a sufficient conviction of the offenders, and the parties shall not be allowed to traverse it. This record, being made out of the sessions, by a particular justice, may be kept by him; or he may make it *indented, [*845] and certify the one part into the Queen's Bench, or

(*m*) 1 Hawk. P. C. c. 64, s. 39.
(*n*) 3 Salk. 169; 3 Burr. 1732; Reg. *v.* Bowser, 8 Dowl. 128.
(*o*) Reg. *v.* Harland, 8 A. & E. 826; 2 Moo. & R. 141.
(*p*) Dalt. c. 44; 1 Hawk. P. C. c. 66, s. 8.
(*q*) Dalt. c. 44.
(*r*) 15 Ric. 2, c. 2.

leave it with the clerk of the peace; and the other part he may keep himself. For this view of the force by the justice, being a judge of record, makes his record thereof, in the judgment of the law, as strong and effectual as if the offenders had confessed the force before him; and, as far as regards the restraining of traverse, more effectual than if the force had been found by a jury, upon the evidence of others. A conviction for a forcible detainer must show on the face of it an unlawful entry, as well as a forcible detainer: a conviction on the view merely of the justices, without any evidence of an unlawful entry, is bad, even though information and complaint of an unlawful expulsion be stated (*s*). An inquisition taken under the 8 Hen. 6, c. 9, should set forth the estate possessed by the party in the property (*t*). It is doubtful whether the holding over by a termor after the expiration of his term is constructively an unlawful entry (*u*). The court will not compel magistrates to hear a complaint and act summarily under the statutes (*x*).

Restitution by the Queen's Bench. — Although regularly the justices only who were present at the inquiry, and when the indictment was found, ought to award restitution; yet if the record of the presentment or indictment be certified by the justice or justices into the Queen's Bench, or the same presentment or indictment be removed or certified thither by certiorari, the justices of that court may award a writ of restitution to the sheriff, to restore possession to the party expelled; for the justices of the Queen's Bench have a supreme authority in all cases of the crown (*y*). Also where, upon removal of the proceedings into the Queen's Bench, the conviction shall be quashed, the court will order restitution to the party injured. Where a conviction of forcible entry was quashed for the uncertainty of "messuage *or* tenement," but the restitution was opposed, on an affidavit that the party's title (which was by lease) was expired since the conviction, the court said they had no discretionary power in this case;

(*s*) Rex *v.* Wilson, 1 A. & E. 627; 3 Id. 817.

(*t*) Reg. *v.* Bowser, 8 Dowl. 128.

(*u*) Rex *v.* Oakley, 4 B. & Adol. 307.

(*x*) *Ex parte* Davy, 2 Dowl., N. S. 24.

(*y*) Dalt. c. 44.

but were bound to award restitution on quashing the conviction (*z*).

Riot. — If a forcible entry or detainer shall be made by three persons or more, it is also a riot, and may be proceeded against as such, if no inquiry has before been made of the force (*a*).

What is forcible entry. — In general, it seems clear, that to denominate the entry forcible, it ought to be accompanied with some circumstances of actual *violence or terror;* and therefore that an entry, which has no other force than *such as is implied by the law in every trespass [*846] whatsoever, is not within these statutes (*b*). With respect to *violence*, it seems to be agreed that an entry may be forcible, not only in respect of a violence actually done to the person of a man, — as by beating him if he refuse to relinquish his possession; — but also in respect of any other kind of violence in the manner of the entry, — as by breaking open the doors of a house, whether any person be in it or not, especially if it be a dwelling-house; and perhaps, also, by an act of outrage after the entry, — as by carrying away the party's goods. It seems, however, that an entry is not forcible, by the bare drawing up of a latch, or pulling back the bolt of the door, there being no appearance therein of being done by a strong hand or multitude of people: and it has been held, that an entry into a house through a window, or by opening a door with a key, is not forcible (*c*). With respect to the circumstances of *terror*, it is to be observed, that wherever a man, either by his behaviour or speech at the time of his entry, gives those who are in possession just cause to fear that he will do them some bodily hurt, if they will not give way to him, his entry is esteemed forcible. This is the case whether he cause such a terror, by carrying with him an unusual number of attendants: or by arming himself in such a manner as plainly intimates a design to kill, maim or beat

(*z*) Rex *v.* Jones, 1 Stra. 474.

(*a*) Dalt. c. 44; 1 Russ. on Crimes, 380, 428 (4th ed.).

(*b*) Rex *v.* Smyth, 5 C. & P. 201; 1 Moo. & R. 155; 1 Russ. on Crimes, 426 (4th ed.); 2 Burn's J. 597 (30th ed.).

(*c*) 1 Hawk. P. C. c. 64, s. 26; 1 Russ. on Crimes, 427 (4th ed.).

those who shall continue in possession; or threatening to do so, or using such expressions as plainly imply a purpose of using force (*d*). It seems that if a person enter into another man's house or ground with apparent violence, though it be but to cut or take away his corn, grass or other goods, or to fell or chop wood, or do any other like trespass, and though he do not put the party out of his possession, it is a forcible entry. If the entry were peaceable, and after such entry made, parties cut or take away any other man's corn, grass, wood or other goods, without apparant violence or force, such acts are not punishable as forcible entries (*e*); but if he enter peaceably, and then by force or violence cut or take away any corn, grass or wood, or forcibly or wrongfully carry away any other goods there being, it seems to be a forcible entry punishable by the statutes. But no entry is forcible from any threatening to spoil another's goods, or to destroy his cattle, or to do him any other such like damage, which is not personal (*e*). It is a forcible entry, if a man, having an estate in land, by a defeasible title, continue with force in the possession thereof, after a claim made by one who had a right of entry thereto (*f*).

[*847] * **By whom a forcible entry may be made.** — It is clear that a forcible entry may be committed by a single person, as well as by twenty (*g*); but those who accompany a man, when he makes a forcible entry, shall be judged to enter with him, whether they actually come upon the lands or not (*h*). He, however, who barely agrees to a forcible entry made to his own use, without his knowledge or privity, shall not be adjudged to make an entry within these statutes, because he noway concurred in or promoted the force (*i*).

What is a forcible detainer. — The same circumstances of violence and terror, which will make an entry forcible, will make a detainer forcible also: and a detainer may be forcible, whether the entry were forcible or not (*k*).

(*d*) 1 Hawk. P. C. c. 64, s. 27.
(*e*) Dalt. c. 126.
(*f*) 1 Hawk. P. C. c. 64, s. 23.
(*g*) Id. s. 29.
(*h*) Id. s. 22.
(*i*) 1 Hawk. P. C. c. 64, s. 24.
(*k*) Id. s. 30; 1 Russ. on Crimes, 427 (4th ed.); 2 Burn's J. 598 (30th ed.).

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